11 January 2017

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellant*,	)	APPEAL BY THE UNITED STATES UNDER ARTICLE 62, UCMJ
v.	)	
	)	Misc. Dkt. No. 2016-16
Senior Airman (E-4) CHAD A. BLATNEY, USAF, *Appellee.*	)	Panel No. 1

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

COMES NOW the United States, pursuant to Article 62, UCMJ, and respectfully requests that this Court set aside the military judge's ruling suppressing Appellee's act of unlocking his cellular phone as well the evidence found on the phone.

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED BY SUPPRESSING APPELLEE'S ACT OF UNLOCKING HIS CELLULAR PHONE AS WELL AS THE CONTENTS OF APPELLEE'S PHONE PURSUANT TO THE FIFTH AMENDMENT.

STATEMENT OF THE CASE

On 7 October 2016, Appellee was charged with one specification under Article 112a, UCMJ, of wrongful use of cocaine. The case was referred to a special court-martial on 11 October 2016.

On 29 November 2016, the day before trial commenced, Appellee filed a motion for appropriate relief to exclude all data found on Appellee's cellular phone. (App. Ex. II.)

Specifically, trial defense counsel contended that Appellee had revoked consent to search his phone prior to two occasions on which the Air Force Office of Special Investigations (OSI) reviewing the data seized from his phone. (Id. at 4.) Trial defense counsel also argued that Appellee had not voluntarily consented to the search of the phone in the first place. (Id. at 5.) In this motion, Appellee did not ask the military judge to suppress the contents of the phone on the basis that Appellee's Fifth Amendment rights had been violated by his act of unlocking the phone with his password. (Id.)

The court-martial began on 30 November 2016. The Government did not file a written response to the motion to dismiss, but offered oral argument on the record. (R. at 43-48.) After trial counsel's argument on the motion, the military judge *sua sponte* raised the issue of whether OSI's request for Appellee's password violated the Fifth Amendment as discussed in United States v. Bondo, ACM 38438 (A.F. Ct. Crim. App. 18 March 2015) (unpub. op.) (R. at 48.) Trial counsel provided additional argument to the military judge via email on 30 November 2016. (R. at 160; App. Ex. VII.)

The military judge issued her ruling granting Appellee's motion on 30 November 2016 and suppressed Appellee's act of unlocking the phone and the entire contents of the phone on the basis that Appellee's Fifth Amendment rights had been violated.

(R. at 70; App. Ex. IV.) On 2 December 2016, trial counsel recalled SA J.C. to testify about the circumstances of taking Appellee's phone before the OSI interview and asked the military judge to make supplementary findings of fact. (R. at 173-85.) Later on 2 December 2016, the military judge issued her supplemental ruling containing additional findings of fact. (R. at 187; App. Ex. X.)

On 2 December 2016, the Government filed a notice of appeal. (App. Ex. XI.) This Court has jurisdiction to hear this appeal pursuant to Article 62(a)(1)(B), UCMJ: "In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal . . . [a]n order or ruling that . . . excludes evidence that is substantial proof of a fact material to the proceedings."

STATEMENT OF FACTS

The military judge made the following findings of fact in her ruling:

> 1. With respect to attachments 1-5 to the defense motion (Appellate Exhibits (AE) II), AE I, and AE III, the Court adopts as fact for purposes of this ruling all matters contained within those documents as accurately reflecting the items or information identified.
>
> 2. The accused is charged with one charge, one specification of cocaine use in violation of Article 112a, UCMJ. The use is alleged to have occurred between on or about 25 July 2016 and on or about 8 August 2016.

3. The OSI investigation started on 19 August 2016, after receiving evidence the accused tested positive in an uranalysis conducted on 8 August 2016. On 19 August 2016, the accused reported in to OSI to be interviewed.

4. SA [J.C.] is the lead agent in this investigation. He testified credibly.

5. On 19 August 2016, SA [J.C.] and SA [J.R.] interviewed the accused at OSI Det 815. The accused was not free to walk out. The interview was recorded and is attachment 1 to AE II.

6. Around 15 minutes passed from the time the accused entered the interview room until SA [J.C.] read him the Article 31 rights advisement card. During those 15 minutes, the accused was left alone for about 2 minutes, and for another 6 minutes SA Roberson collected administrative data while SA [J.C.] engaged in rapport building. At 11.20 SA [J.C.] asked the accused about how he knew a Mr. Pugh. At 15.44 SA [J.C.] began to transition the interview and at 16.16 on the video SA [J.C.] read the Article 31 right advisement card to the accused:

7. He identified the crime under investigation as Article 112a – use of a controlled substance and identified the accused as a suspect. At 17.18 the following colloquy occurred between the accused and SAs [J.C.] and [J.R.]:

OSI: Do you want a lawyer?
ACC: Yes.
OSI: Okay, alright. At this point we're going to finish some admin and stuff.
ACC: Okay.
OSI: Alright?
ACC: Yes.
OSI: And, uh, we'll probably step out, um, on top of that, um do you give us consent to search your phone?
ACC: Sure
OSI: Do you give us consent to search your residence?
ACC: Yeah
OSI: And your car?
ACC: Yes, I do.
OSI: Let's go do a little paperwork and we'll be right back with you.
ACC: Okay

8. Shortly after, OSI departed the interview room at 17.54.

9. SAs [J.C.] and [J.R.] returned to the interview room at 26.00. SA [J.C.] takes the seat at the table and begins to fill out the consent to search forms with the following colloquy:

OSI: Alright man you can scoot up here. (began filling out consent for search and seizure forms)
ACC: Alright
OSI: Alright. So, what a kind of car do you have?
ACC: Pontiac Firebird 2001
OSI: What color?
ACC: Black.
OSI: Black. Your license plate? (unclear)
ACC: I can't remember.
OSI: Texas.
ACC: Texas, yes.
OSI: A, what kind of phone do you have?
ACC: Verizon, iPhone.
OSI: iPhone 5? 6?
ACC: Think it's just a 6.
OSI: Is it like an S or anything like that you know?
ACC: I, I don't think so..
OSI: Okay.

ACC: I could be wrong.
OSI: iPhone 6, black?
ACC: Um, I think it's white, my cover's black.
OSI: Oh is it? Okay.
ACC: Yeah.
OSI: Alright. Then a, what's your residence, your address?
ACC: [ ]
OSI: (noise)
ACC: [N.] Road
OSI: Spell that again for me so I don't mess it...
ACC: N-o-n-e-
OSI: (noise)
ACC: s-u-h – ah – s-u-c-h
OSI: Literally [N.]?
ACC: Yeah, apartment [ ].
OSI: [ ]?
ACC: Yes.

OSI: Alright. So if you would. If you want to read over this. Okay. This is just a consent form, you said you would give us consent to search.
ACC: Okay
OSI: And when you're done with that, go ahead and sign down there.
ACC: (signs form)
OSI: Same thing, do that for me.
ACC: (signs form)
OSI: (unclear) ...do you have a roommate?
ACC: No, just me.
OSI: Just you? Cool. We'll get that all squared away and try to get you out of here early.
ACC: Sounds good. Do you all need the keys to my car?
OSI: Yeah, I'll uh, let me get everything squared away. Is all that stuff out there?
ACC: Uh, yeah, I think my keys are out there.
OSI: Okay. I'll grab you before I get that, and do you have a lock on your phone?
ACC: Yes.
OSI: Let me grab that. If you won't mind a, just unlocking it and also just turning it off, the lock or whatever for me.
ACC: Okay.
OSI: Appreciate that.
ACC: Do you know how to turn the lock off man? (raises voice to agents that have departed room)
OSI ([J.C.]): A, gosh, go settings, ...
OSI ([J.R.]): Passcode (points to the phone screen)
ACC: Oh.
OSI: Enter it, enter your passcode again and then it will say turn off.
ACC: Okay (unclear), there it is. This.
OSI: Should be good.
ACC: Yep, there you go.
OSI: Awesome, appreciate it.
ACC: No problem.
OSI: I'll come back and grab you; need anything?
10. The agents depart shortly thereafter at 30.06.

11. SA [J.C.] observed the accused enter a series of numbers to unlock the cell phone.

12. At 35.56, SA [J.C.] returned and informed the accused the cell phone is actually "black and silver" and asked the accused to initial the consent form regarding the change. The accused initialed the form.

13. SA [J.C.] testified he did not have probable cause to search the cell phone at the time he requested consent from the accused to search the phone.

14. That same day, SA [J.C.] used Cellebrite to extract the phone's information, and then returned the phone to the accused before the accused left OSI. SA [J.C.] reviewed the produced Cellebrite UFED report that day, 19 August 2016. He viewed one text exchange he believed relevant to the investigation, specifically, the accused texted on 10 August 2016, "Haven't heard anything yet from yesterday btw."

15. On 24 August 2016, the accused's defense counsel, submitted a notice of representation to OSI. That notification revoked "any consent to search/seize that may have been previously given."

16. On 18 September 2016, SA [J.C.] again reviewed the produced Cellebrite UFED report of the accused's cell phone. SA [J.C.] noted two more text exchanges he believed were relevant to the investigation, specifically, the accused responded to a text on 9 August 2016, that asked, "...I was just curious if u heard anything" which the accused responded, "Na not yet lol." The other exchange identified the urinalysis recall, and the accused received a text that asked, "Did you pass? Haha. Did anyone fail?" The accused replied, "Not that I know of."

17. On 30 November 2016, Col Joseph Wistaria, military magistrate, authorized consent to search "cellebrite extraction dated 9 Aug 16" and seizure, copying and analysis of the following specified property, "search of Cellebrite extraction, dated 19 Aug 16 taken from iPhone 6 serial number F19Q4GJ1G5MC." He received legal advice from a judge advocate at the 17th Training Wing at Goodfellow AFB, Texas.

(App. Ex. IV at 1-4.)

Pursuant to the United States' request to engage in additional fact-finding, the military judge made the following additional findings of fact:

1. On 19 August 2016, at OSI Det 815, the accused entered the OSI detachment. Pursuant to OSI policy, two OSI agents searched and removed the accused's property from his possession prior to placing the accused in the interview room. The two agents that searched the accused, took his personal property that considered of his keys, phone, and miscellaneous items, and in front of the accused, placed his property on a long table approximately five feet from the interview room. The accused's property were the only items on the table.

2. SA [J.C.] knew from OSI protocol where the accused's property would be, and was informed by the other OSI agents that the accused's property was on the table. SA [J.C.] also saw the accused's property on the table when he entered the interview room.

3. During the interview, and after the accused unequivocally invoked his right to counsel, the following colloquy occurred between SA [J.C.] and the accused at 23.50:

OSI: Okay. I'll grab you before I get that, and do you have a lock on your phone?
ACC: Yes.
OSI: Let me grab that.

4. SA [J.C.] then stepped outside the interview room (28.58). SA [J.C.] took the accused's cell phone from the table outside the interview room and returned to the interview room at 29.02. While walking into the room, he had the accused's cell phone in his hand and reached out with it toward the accused and simultaneously stated:

OSI: If you won't mind a, just unlocking it (the accused took the phone handed to him) and also just turning it off, the lock or whatever for me.
ACC: Okay.
OSI: Appreciate that.

(App. Ex. X at 1-2.)

The United States does not contend that any of the military judge's findings of fact were clearly erroneous.

ARGUMENT

THE MILITARY JUDGE ERRED BY SUPPRESSING APPELLEE'S ACT OF UNLOCKING HIS CELLULAR PHONE AS WELL AS THE CONTENTS OF THE PHONE PURSUANT TO THE FIFTH AMENDMENT.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995).

Since this is an Article 62 appeal by the United States, this Court may not make findings of fact, but may determine whether the military judge's factual findings are clearly erroneous or unsupported by the record. United States v. Lincoln, 42 M.J. 315, 320 (C.A.A.F. 1995). Matters of law in an Article 62 appeal are reviewed de novo. United States v. Terry, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008), *rev. denied*, 66 M.J. 380 (C.A.A.F. 2008). This Court has explained, "[o]n questions of fact [we ask] whether the decision is *reasonable*; on questions of law, [we ask] whether the decision is correct." Id. (internal citations omitted.)

"A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." United States v. Seay, 60 M.J. 73, 77 (C.A.A.F. 2004) (quoting United States v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004)).

Law

The Fifth Amendment states, "No person . . . shall be compelled in a criminal case to be a witness against himself."[1]

"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).

If a person who is subject to interrogation under circumstances described in subsection Mil. R. Evid. 305(c)(2) chooses to exercise the right to counsel, questioning must cease until counsel is present. Mil. R. Evid. 305(c)(4).

In Edwards v. Arizona, 451 U.S. 477 (1981), the Supreme Court created a bright-line rule that "an accused . . . 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 communications, exchanges or conversations with the police." Edwards, 451 U.S. at 484-85.

The Edwards rule has also been incorporated into military practice through Mil. R. Evid. 305(e)(3)(A). The Rule states:

[1] U.S. Const. Amend. V.

> If an accused or suspect subjected to custodial interrogation requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that: (i) the accused or suspect initiated the communication leading to the waiver; or (ii) the accused or suspect has not continuously had his or her freedom restricted by confinement or other means, during the period between the request for counsel, and the subsequent waiver.

After invoking his rights, an accused may initiate "further communications, exchanges or conversations" by making inquiries and statements that can "fairly be said to represent a desire on the part of an accused to open a more generalized discussion relating directly or indirectly to the investigation." Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983).

"Further interrogation" by authorities in the context of Edwards, has been interpreted to mean "express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). Interrogation also means "any words or actions . . . that the police should know are *reasonably likely* to elicit an incriminating response." Id. (emphasis added).

Our superior Court has commented that "there is no blanket prohibition against comment or a statement by a police officer after an invocation of rights." United States v. Young, 49 M.J. 265 (C.A.A.F. 1998.)

There is no binding precedent in military courts or the Supreme Court that answers the primary issue presented in Appellee's case: whether asking a suspect who has invoked the right to counsel to voluntarily unlock his password-protected phone in aid of a consent search violates Edwards and the Fifth Amendment.

Several federal and state courts have examined the application of the Fifth Amendment to password-protected or encrypted electronic devices and have reached contrary conclusions. State v. Stahl, No. 2D14-4283, 2016 Fla. App. LEXIS 18067 (Fla. Dist. Ct. App. Dec. 7, 2016) (Motion to compel defendant to enter passcode into the cellular phone did not violate Fifth Amendment); Commonwealth v. Gelfgatt, 11 N.E.3d 605, 612 (Mass. 2014); (Defendant can be compelled to decrypt digital evidence where act would not communicate facts beyond which defendant had already admitted); Commonwealth v. Baust, 89 Va. Cir. 267 (Va. Cir. Ct. 2014) (Motion to compel production of defendant's passcode to unlock cellular phone violated Fifth Amendment); United States v. Fricosu, 841 F.Supp. 2d 1232 (D. Col. 2012) (Court order requiring defendant to produce the unencrypted contents of her laptop did not violate Fifth Amendment); In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011 (In re Grand Jury), 670 F.3d 1335 (11th Cir 2012) (Subpoena requiring defendant to produce decrypted contents of

his hard drives violated Fifth Amendment); United States v. Kirschner, 823 F.Supp. 2d 665 (E.D. Mich. 2010) (Subpoena calling for defendant to testify to the password he utilizes for his computer violated Fifth Amendment); In re Grand Jury Subpoena to Boucher (In re Boucher), 2:06-MJ-91, (D.Vt. Feb. 19, 2009) (Subpoena compelling defendant to decrypt his laptop did not offend Fifth Amendment); United States v. Gavegnano, 305 Fed. Appx. 954 (4th Cir. 2009) (No Fifth Amendment violation where defendant was asked to reveal computer password after invocation of right to counsel and Government could independently prove defendant was sole user and possessor of computer).

Notably, with the exception of Gavegnano, these federal and state cases do not address situations where a suspect is asked for and voluntarily provides consent to search a password-protected device, and are therefore not analogous to Appellee's case. The aforementioned federal and state courts that have tackled similar issues have almost uniformly relied on a series of Supreme Court cases: United States v. Fisher, 425 U.S. 391 (1976); United States v. Doe, 465 U.S. 605 (1984) ("Doe I"); Doe v. United States, 497 U.S. 201 (1988) ("Doe II"); and United States v. Hubbell, 530 U.S. 27 (2000).[2]

[2] The military judge also cited each of these cases in her ruling. (App. Ex. IV at 10.)

United States v. Fisher (1976)

In Fisher, the Supreme Court introduced what has come to be known as the "foregone conclusion" doctrine. In that case, the Internal Revenue Service served a summons on taxpayers' lawyers demanding the lawyers produce certain documents pertaining to the preparation of tax returns that were listed in the summons. 425 U.S. at 393-95. Reaffirming that the Fifth Amendment privilege against self-incrimination "protects a person only against being incriminated by his own compelled testimonial communications," the Supreme Court found that the compelled production of the documents did not violate the taxpayer's Fifth Amendment privilege. Id. at 409. The Supreme Court explained that whether an act of production was "testimonial" and "incriminating" for Fifth Amendment purposes would "depend on the facts and circumstances of particular cases." Id. at 410. Despite the fact that the act of production in Fisher had some communicative value – it tacitly conceded that papers existed and were in the possession of the taxpayer – the act was not sufficiently testimonial to invoke the Fifth Amendment privilege. Id. at 411. Since the documents were of a kind "usually prepared by an accountant working of the tax returns of his client," the existence and location of the papers were a "foregone conclusion." Id. As such, the Government did not rely on the taxpayer's "truthtelling" to prove the existence of

or access to the documents. Id. The taxpayer's concession that such papers exists "adds little or nothing to the sum total of the Government's information." Id. Thus, the act of production was a question "not of testimony but of surrender". Id. (quoting In re Harris, 221 U.S. 274, 279 (1911)).

Doe I (1984)

In Doe I, a grand jury subpoenaed various business records related to Doe's sole proprietorship. 465 U.S. at 606. The Supreme Court found that although the contents of the business records themselves were not privileged under the Fifth Amendment,[3] the compelled act of production of those records was protected. Id. at 611-14. Distinguishing Fisher, the Supreme Court refused to overturn the District Court's factual findings that the act of production would involve testimonial self-incrimination. Id. at 613. The enforcement of the subpoena would compel Doe to admit the business records existed, were in his possession, and were authentic. Id. at 613, n.11. Furthermore, the Government was unable to otherwise show that it already knew all the documents demanded in the subpoena existed; thus, it was "attempting to compensate for its lack of knowledge by requiring [Doe] to become, in effect, the primary informant against himself." Id. at 614, n.12.

[3] In finding the contents of the business records were not privileged, the Supreme Court noted that they had been prepared voluntarily and thus were not "compelled" by the Government. Id. at 611-12.

Doe II (1988)

In Doe II, the Government subpoenaed Doe to sign a consent directive directing any bank where he had a bank account to turn over all of its documents relating to that bank account to a grand jury. 487 U.S. at 205, n.2. The consent directive did not reference any specific banks or account numbers. Id. at 205. The Supreme Court found that Doe's act of signing the consent directive was not a "testimonial communication" protected by the Fifth Amendment. Id. at 207. Signing the consent directive did not "force [Doe] to express the contents of his mind," nor did it communicate any factual assertions to the Government. Id. at 210, n.9; 215. Thus, like in Fisher, the Government did not rely on any "truthtelling" in Doe's consent directive to show the existence of, or his control over the bank records that were ultimately produced. Id.at 215.

United States v. Hubbell (2000)

In Hubbell, the Government served a subpoena on Hubbell compelling him to produce 11 categories of documents before a grand jury. Hubbell, 530 U.S. at 31. After Hubbell was granted immunity "to the extent allowed by law," he produced 13,120 pages of documents and records. Id. The Supreme Court found that the derivative use of these compelled documents violated the Fifth Amendment. Id. at 44-45. The Supreme Court reiterated that the act of production could implicitly

communicate statements of fact, and in Hubbell's case, would admit that the documents "existed, were in his possession or control, and were authentic." Id. at 36. The relevant question was whether the Government "has already made 'derivative use' of the testimonial aspect of [the act of production] . . . in preparing its case for trial. Id. at 41. The Supreme Court found that the Government used Hubbell's truthful acknowledgement of the existence of the 13,120 pages as a "lead to incriminating evidence" or "a link in the chain of evidence needed to prosecute." Id. at 42. The Supreme Court also commented that in identifying hundreds of documents responsive to the subpoena, Hubbell had to "make extensive use of 'the contents of his own mind,'" which was "like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox." Id. at 43 (internal citations omitted).

The Supreme Court refused to apply the "forgone conclusion" doctrine from Fisher. Id. at 44. It reasoned that in Fisher the Government already knew the tax documents were in the attorney's possession, and could independently confirm the document's existence and authenticity through the accountants who created them. Id. at 44-45. However, in Hubbell, the Government could not show any prior knowledge of the existence

or whereabouts of the 13,120 pages Hubbell ultimately produced. Id. at 45.

While cases described above provide helpful guidance for addressing the legal questions raised by password-protected electronic devices, the District Court of Appeal of Florida cautions, "the act of production and foregone conclusion doctrines cannot be seamlessly be applied to passcodes and decryption keys." Stahl, 2016 Fla. App. Lexis 18067 at *19.

Analysis

The United States agrees with the military judge's conclusions that Appellee invoked his right to counsel (App. Ex. IV at 15), that he voluntarily consented to the search of his phone (Id. at 16), and that inevitable discovery, the independent-source doctrine, and the good faith exception do not apply in this case. (Id. at 17.)

However, the United States asserts that the military judge erred in concluding that OSI's questions to Appellee while completing the consent form and their request that Appellee unlock his phone violated Appellee's Fifth Amendment rights. (Id.) The military judge also erred by excluding all information gathered from Appellee's phone as "fruit of the poisonous tree." (Id.) Although the military judge correctly cited much of the relevant law, she applied that law incorrectly and thereby abused her discretion.

The fact pattern in this case raises several legal questions that this Court must answer. The first legal question relates to the other questions OSI posed to Appellant while filling out the consent to search form, such as his address and the type of phone he owned: (a) Were OSI's questions related to the scope of the search "further interrogation" as defined by Innis, and therefore asked in violation of Edwards?

The second set of legal questions relates to OSI's request that Appellee unlock his phone: (b) Was OSI's request that Appellee unlock his phone "further interrogation" as defined by Innis, and therefore made in violation of Edwards; or was Appellee's consensual act of unlocking his phone otherwise protected by the Fifth Amendment privilege against self-incrimination?

Finally, the facts and circumstances of this case raise one last legal question: (c) Assuming a violation of Appellee's right occurred, does that violation require the suppression of the evidence from Appellee's phone as the "fruit of the poisonous tree?"

For the reasons explained below, the OSI agents' comments and request for Appellee to unlock his cell phone post-invocation of rights did not constitute "further interrogation" as defined in Innis, and therefore did not violate Edwards. Further, Appellee's consensual act of unlocking his phone did

not violate the Fifth Amendment. Finally, even if Appellee's rights were somehow violated, the neither Fifth Amendment nor M.R.E. 305(c)(2) required suppression of the entire contents of Appellee's phone as "fruit of the poisonous tree." Therefore, the military judge erred in suppressing Appellee's act of unlocking his phone and in suppressing the contents of Appellee's phone.

(a) OSI's questions related to the scope of the search did not constitute "further interrogation" under Innis.

The military judge incorrectly concluded that SA JC's "ten minute questioning of the accused, post invocation of counsel, violated the accused's Fifth Amendment rights." (App. Ex. IV at 16.) This conclusion is based on an incorrect application of the law. Appellee stated he consented to a search of his residence, vehicle, and phone. Then, the OSI agents continued to ask him basic questions about the items to be searched while completing the consent to search form. (App. Ex. IV at 2-3; App. Ex. II, Attach. 2.) These questions addressed the type of car he drove, his license plate, his address, the type of phone he owned, and whether his phone was locked. Most of Appellee's answers were clearly incorporated into the consent to search form. (App. Ex. II, Attach. 2.)

Although these questions were posed after Appellee's invocation of the right to counsel, they did not constitute

"further interrogation" as defined by Innis and as prohibited by Edwards. They were not questions the OSI agents should have known were "*reasonably likely* to elicit an incriminating response." Indeed, the questions did not elicit *incriminating* responses from Appellee. There was nothing inherently incriminating about the fact that Appellee drove a Pontiac Firebird 2001, carried an iPhone 6, lived on a certain street, and had a passcode lock on his cell phone.[4] OSI's questions were not directed at connecting Appellee to any crime scene or any incriminating evidence OSI knew to exist. *See* United States Garcia, 1996 U.S. Dist. LEXIS 14035, 29-31 (S.D.N.Y. Sept. 24, 1996) ("The closer the connection between the crime and the questions posed, 'the stronger the inference that the agent should have known that inquiry was 'reasonably likely to elicit an incriminating response from the suspect.'")[5]

In Appellee's case, SA J.C. acknowledged that at the time he asked for Appellee's consent, he did not assume there was

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[4] According to the video of Appellee's interview (App. Ex. II, Attach 1), Appellee had already provided his address to the OSI agents as part of the biographical data collected before the interview began. These questions can be categorized as permissible "booking questions" that do not constitute interrogation. Pennsylvania v. Muniz, 496 US. 582, 601 (1990); *See also* United States v. Knope, 655 F.3d 647, 652 (7th Cir. 2011). In short, questions about Appellee's address were not incriminating, and not the product of "interrogation."

[5] This analysis might have been different if, for example, the agents had been searching for a stolen 2001 Pontiac Firebird, and Appellee was asked to confirm he currently had a 2001 Pontiac Firebird in his control and possession. *See e.g.* United States v. Henley, 984 F.2d 1040 (9th Cir. 1993) (Police officer's question as to suspect's ownership of a car constituted interrogation where police already suspected that the car in question had been used in a bank robbery). However, these were not the facts of the case.

incriminating evidence on Appellee's phone and that he did not even have probable cause to obtain a search warrant to search Appellee's phone. (R. at 24.) As such, OSI would not have reasonably believed that asking Appellee very basic questions about his ownership of items would elicit an incriminating response. OSI's questions served merely to establish and verify Appellee's authority to consent to the search of his possessions, and as such were permissible under Edwards and Innis. *See* Garcia, 1996 U.S. Dist. LEXIS 14035 at *30-31 (quoting United States v. Henley, 984 F.2d at 1043-44 ("the police may – and should – continue establishing ownership and authority before conducting consent searches."))

It is true that OSI used the information proffered by Appellee to complete the consent form, and thus, these statements indirectly facilitated the consent search and the discovery of incriminating evidence on Appellee's phone. But it has never been the rule that law enforcement officers may not ask questions that *might* lead to incriminating evidence after a suspect invoke the right to counsel. If that were the case, police officers would be prohibited from asking for consent to search after a suspect has invoked his right to counsel. Yet, federal circuit courts have repeatedly held the opposite: that a request for consent to search after the invocation of the right to counsel does not constitute "further interrogation"

under Innis. *See* United States v. Gonzales, 151 F.3d 1030, 1998 U.S. App. LEXIS 14891, 4th Cir. July 1, 1998) (per curiam) (unpublished); Smith v. Wainwright, 581 F.2d 1149, 1152 (5th Cir. United States v. Cooney, 26 Fed. Appx. 513, 523 (6th Cir. 2002); United States v. Shlater, 85 F.3d 1251, 1256 (7th Cir. 1996); Cody v. Solem, 755 F.2d 1323, 1330 (8th Cir. 1985); Everett v. Sec'y, Fla. Dep't of Corr., 779 F.3d 1212, 1244-45 (11th Cir. 2015).[6]

The key reasoning from these cases focuses on the fact that a request for consent to search is not likely to elicit an incriminating statement. As the United States District Court for the Eastern District of Virginia has said, "even if incriminating evidence is obtained as a result of a consensual search, that does not mean the request for consent is interrogation under Miranda." United States v. Guess, 756 F.Supp.2d 730, 746 (E.D. Va. 2010). *See also* Henley, ("The mere act of consenting to a search . . . does not incriminate a defendant, even though the derivative evidence uncovered may itself be highly incriminating.") This logic applies equally to Appellee's case: since the questions posed to Appellee to facilitate the consent search were unlikely to (and did not) elicit an incriminating response from Appellee, the fact that

[6] Moreover, every federal circuit who has addressed the question, has held that a request for consent to search does not even trigger the need for Miranda warnings. United States v. Glenna, 878 F.2d 967, 971 (7th Cir. 1989) (collecting cases).

the consent search ultimately led to incriminating evidence does not suddenly convert those questions into "interrogation."

It should be recognized that in United States v. Hutchins, our superior Court may have taken a more stringent view of standard in Edwards than a plain reading of the Edwards opinion would suggest. CAAF stated, "The Edwards rule does not merely prohibit further interrogation without the benefit of counsel, it prohibits further "communications, exchanges, or conversations" that may (and in this case, did) lead to further interrogation." 72 M.J. at 298. The Navy-Marine Corps Court of Criminal Appeals has questioned this interpretation of Edwards, reasoning that the language "further communications, exchanges or conversations" has only been used by the Supreme Court to describe activities initiated by an accused, and never to describe activities initiated by police. United States v. Maza, 73 M.J. 507, 520-21 (N.M. Ct. Crim. App. 2014). *See also* United States v. Stevenson, ACM S32244 at *16 (A.F. Ct. Crim. App. 30 September 2015) (unpub. op.) (Expressing belief that Hutchins "is not a per se bar to all police initiated communication after invocation of rights, but instead should be read in conjunction with the facts and circumstances of each case.")

However, even under this more onerous prohibition, OSI's conduct did not violate Edwards. OSI's communications, exchanges, and conversations with Appellee after he invoked the

right to counsel did not lead to further interrogation of Appellee. Instead, it merely enabled the agents to search the phone and to find previously created text messages that had not been compelled under the Fifth Amendment.

In United States v. Griffing, ACM 38443 at *12-13, n.7 (A.F. Ct. Crim. App. 23 March 2015)(unpub op.), this Court declined to apply Hutchins where a suspect consented to a search after invoking the right to counsel, because the suspect "did not make any incriminating responses as part of or following that interaction with the AFOSI agent." Just as in Griffing, Appellee in this case did not make any incriminating statements in response to the agents' continued questions about the scope of the search. Applying the reasoning of Griffing, CAAF's decision in Hutchins provides no basis to suppress the evidence in this case. The military judge erred by concluding that the questions posed to Appellee violated Edwards and/or the Fifth Amendment and warranted suppression of the contents of Appellee's phone.

(b) OSI's request that Appellee unlock his phone was not "further interrogation" as defined by Innis or otherwise in violation of the Fifth Amendment privilege against self-incrimination.

For many of the same reasons described immediately above, OSI's request that Appellee unlock his phone did not constitute "further interrogation" in violation of Edwards. As will be

discussed in further detail below, OSI's request did not seek an incriminating *response* or "testimony,[7]" and Appellee's consensual act of unlocking the phone was not inherently incriminating. *See also* United States v. Sheri Lee Pualani Kapahu, 2016 U.S. Dist. LEXIS 138620 (D. Haw. Oct. 5, 2016) (Request for suspect's cell phone passcode was not "interrogation" under Miranda.)

In addition to finding that OSI wrongfully reinitiated communications with Appellee after he invoked his right to counsel, the military judge concluded that Appellee's act of unlocking his cell phone was a nonverbal incriminating statement taken in violation of his Fifth Amendment rights. (App. Ex IV at 16-17.) Although the military judge appears to have been conducting the correct legal inquiry, she reached the wrong legal conclusion. *See* Everett, 779 F.3d at 1243 (Considering whether a request for consent to collect DNA made after the suspect invoked his right to counsel violated Edwards *and* was otherwise protected by the Fifth Amendment's privilege against self-incrimination.)

"To qualify for the Fifth Amendment privilege a communication must be testimonial, incriminating, and compelled."[8] Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177,

[7] *See* Wainwright, 581 F.2d at 1152 (Giving consent to search after invocation of right to counsel does not violate Edwards because it is not evidence of a *testimonial* or communicative nature) (emphasis added).
[8] The distinction between statements that are "testimony" and are "incriminating" often seems to be significantly blurred in federal case law.

189 (emphasis added). *See also* Fisher, 425 U.S. at 408 ("the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating.")

(1) Appellee's consensual act of unlocking his phone was not compelled and neither were the contents of Appellee's phone

This Court must first acknowledge that a statement obtained in violation of Miranda or Edwards, but which is otherwise voluntary and not coerced, does not actually violate the Fifth Amendment of the Constitution. United States v. Ravenel, 26 M.J. 344, 347 (C.M.A. 1988) (citing Oregon v. Elstad, 470 U.S. 298, 306 (1985)). Only a compelled confession violates the Constitution itself. Id. *See also* United States v. Patane, 542 U.S. 630, 639 (2004) (the prophylactic rules of Miranda and Edwards "necessarily sweep beyond the actual protections of the Self-Incrimination Clause.")

It is thus worth recognizing that Appellee voluntarily consented to the search of his phone, which immediately differentiates this case from any case involving a search warrant or subpoena that directs a suspect to produce certain documents. Thus, even if Appellee unlocked his phone in

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See e.g. Cooney, 26 Fed. Appx. At 523 ("consenting to a search is not an incriminating statement under the Fifth Amendment because the consent is not evidence of a testimonial or communicative nature.")

violation of the Edwards prophylactic rule, it does not automatically follow that the act was "compelled." Here, where the military judge correctly concluded that Appellee voluntarily consented to unlocking his phone, it is quite clear that the act was not compelled for purposes of the Fifth Amendment. In fact, the military judge's finding that consent was voluntary given *precludes* any finding of an actual Fifth Amendment violation according to Hiibel. At most, the military judge could have found that the OSI agents violated Edwards.

Of course, if this Court were to find an Edwards violation in this case, it could still uphold the suppression of Appellee's act of unlocking the phone. Edwards, 451 U.S. at 485. But as argued above and below, there was no Edwards violation in OSI's request for Appellee to unlock his phone, because such a request did not require or expect Appellee to provide incriminating responses or testimony.

Nonetheless, this Court should also make the distinction that regardless of whether the act of unlocking the phone was compelled, the *contents* of phone in this case were certainly not "compelled" within the meaning of the Fifth Amendment. Fisher, 425 U.S. at 409-10 (where documents were prepared "wholly voluntarily . . . they cannot be said to contain compelled testimony."); Hubbell, 530 U.S. at 36. The Second Circuit addressed a similar argument in Flynn v. James, 513 Fed. Appx.

37, 39-40 (2d Cir. 2013) and found no Fifth Amendment violation where a cassette tape found during a consent search of a suspect's home contained incriminating statements. The Second Circuit explained, "the cassette had been voluntarily prepared by Flynn before the involvement of any police officers, and thus it could not be said to contain compelled testimonial evidence." Id. (internal citation and quotations omitted). Likewise, any evidence contained on Appellee's phone was created well before it was seized by the OSI agents in this case; it was not "compelled" within the meaning of the Fifth Amendment.

(2) Appellee's consensual act of unlocking his phone was not sufficiently testimonial to invoke Edwards or the Fifth Amendment.

"In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." Doe II, 487 U.S. at 210.

The United States does not dispute the military judge's conclusion that Appellee's act of entering his password was a nonverbal statement. (App. Ex. IV at 17.) However, this Court must examine what actual factual assertion or information was disclosed by Appellee's act of entering his password.

a. Appellee was not required to disclose the contents of his mind to the OSI agents.

First, it must be emphasized that Appellee never communicated his actual password to the OSI agents. To the

extent Appellee used the "contents of his own mind" to unlock the phone, the contents of his mind remained inside his mind and were never disclosed to investigators. There is no indication whatsoever in the record that the OSI agents now know (or ever learned) Appellee's password.[9]

It is not enough that a suspect *use* the contents of his own mind to engage in an act of production. In order to offend the Fifth Amendment, an act of production must *disclose* the contents of the suspect's mind. As the Supreme Court emphasized in Doe II, "it is the extortion of information from the accused, the attempt to force him to *disclose* the contents of his own mind that implicates the Self-Incrimination Clause." Doe II, 487 U.S. at 211 (emphasis added). This understanding is reinforced by Hubbell, where the Supreme Court found a Fifth Amendment violation where the suspect was required to "make extensive use of 'the contents of his own mind' in identifying the hundreds of document responsive to the requests in the subpoena." Hubbell, 530 U.S. at 43. Importantly, however, the Supreme Court deemed Hubbell's act of identifying and producing responsive documents as the equivalent of making him "*disclose* the existence and location of particular documents." Id. at 41. Not only did Hubbell use the contents of his mind, he was required to

[9] This fact immediately distinguishes this case from Kirchner, 823 F.Supp.2d at 668, where subpoenas requiring defendants to testify to their passcodes were deemed to violate the Fifth Amendments.

communicate the contents to the government. Conversely, under the facts of this case, Appellee used the contents of his mind to unlock his phone, but did not disclose the contents of his mind to OSI. As such, the military judge was wrong to conclude that OSI's request "required the accused to disclose the contents of his mind to accomplish the act." (App. Ex. IV at 16.)

b. The unlocking of the password only communicated information that was a "foregone conclusion."

Nonetheless, the Supreme Court has recognized that an act of production may have testimonial or communicative aspects. Fisher, 425 U.S. at 410. Several federal and state courts have considered that providing a password or providing an electronic device in an unlocked state constitutes an "act of production" that may have testimonial implications. *See e.g.* Stahl, 2016 Fla. App. Lexis 18067 at *12-13; Gelfgatt, 11 N.E.3d at 612; In re Grand Jury, 670 F.3d at 1341; In re Boucher, 2:06-MJ-91 at *2-3.

In this case, the only information that Appellee's act of entering his password actually conveyed to the United States was that Appellee owned the phone and that Appellee knew the password to his phone. Appellee's actions did not communicate any information whatsoever about the *contents* of the phone and did not convey any information about the drug use offense which

with Appellee was ultimately charged. *Cf.* Stahl, at 2016 Fla. App. Lexis 18067 at *15. ("By providing the passcode, Stahl would not be acknowledging that the phone contains evidence of video voyeurism.")

Significantly, the two factual assertions conveyed by Appellee's act were "foregone conclusions" as described in Fisher. The OSI agents already knew the phone belonged to Appellee because that same phone been taken from Appellee pursuant to OSI protocol immediately prior to the beginning of his interview. Moreover, the fact that Appellee knew the passcode to his own phone was self-evident. It is "a near truism" that any owner of a personal cell phone would know its password. *See* Fisher, 425 U.S. at 411 (Noting that a compelled handwriting exemplar forces a suspect to admit his ability to write, but such an assertion is a "near truism.") The implicit assertions that Appellee owned the phone and knew the passcode "add[ed] little or nothing to the sum total of the Government's information." *See* Gavegnano, 305 Fed. Appx. at 956 (Any testimony inherent in defendant's revealing computer password was a "foregone conclusion" where Government already knew defendant was the sole user and possessor of computer.")

Since the assertions implicit in the act of unlocking the phone were foregone conclusions in this case, they simply were not "testimonial," and thus, not protected by the Fifth

Amendment. Like in Fisher, "the question is not of *testimony*, but of surrender." Id. 425 U.S. at 411 (emphasis added). The military judge erred by failing to consider and apply the "foregone conclusion" doctrine to Appellee's act of unlocking his phone. Had the military judge done so, she would have found no grounds to suppress Appellee's act of unlocking his phone, or its contents.

Some courts have applied the "foregone conclusion" doctrine in such a way that it requires the Government to show that it knows with "reasonable particularity" the location, existence and authenticity of evidence that a suspect is compelled to produce, the most prominent example being the 11th Circuit Court of Appeals in In re Grand Jury. 670 F.3d at 1344. *See also* Fricosu, 841 F.Supp.2d at 1237; In re Boucher, No.2:06-mj-91 at 10-11.

In re Grand Jury involved a suspect who was ordered to produce the contents of his external hard drives to the Government in an unencrypted fashion. 670 F.3d at 1337. The Eleventh Circuit found that the forced act of decryption was testimonial and violated the Fifth Amendment, because "by decrypting the contents, [the defendant] would be testifying that he, as opposed to some other person, placed the contents on the hard drive, encrypted the contents, and could retrieve and examine them whenever he wished." Id. at 1339-40. Furthermore,

since the Government could not show with "reasonable particularity" that it knew the location, existence and authenticity of the files it sought from the hard drives, it could not invoke the "foregone conclusion" doctrine. Id. at 1346.

However, this approach has met with criticism from other sources, including Professor Orin Kerr of George Washington University.[10] Professor Kerr argues that since a defendant's entering of a passcode says nothing about the contents of the device, there is no basis for requiring the Government to show prior and particularized knowledge of the contents of the device. Id. He highlights that the testimony implicit in complying with the subpoenas in Hubbell and Fisher was "very different from the testimony implied by entering a password." Id. *See also* Stahl, 2016 Fla. App. Lexis 18067 at *18-20 (Distinguishing In re Grand Jury on the grounds that its subpoena required produced contents of his hard drives, rather than just a password, and allowing the State in Stahl to invoke the foregone conclusion doctrine without demonstrating any prior knowledge of the contents of the phone.)

[10] Orin Kerr, *The Fifth Amendment Limits on Forced Decryption and Applying the 'Foregone Conclusion' Doctrine"* The Volokh Conspiracy, THE WASHINGTON POST(7 June 2016) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/07/the-fifth-amendment-limits-on-forced-decryption-and-applying-the-foregone-conclusion-doctrine/?utm_term=.e45c608a7405 (Last Accessed 11 January 2017).

Even if the Eleventh Circuit's analysis of the foregone conclusion doctrine is correct, it is doubtful that it should be applied in a case such as this, where the Appellee consented to the search of his phone, rather than being ordered to produce its unencrypted contents. Here, the "act of production" is Appellee producing his password, not the contents of his phone. OSI did not ask Appellee for any particular contents on his phone; they only asked to conduct a search of the phone without designating any further parameters. (App. Ex. IV at 2.) Although the agents made a copy of the contents of Appellee's phone, this did not convert the search into an act of production by Appellee. "A valid consent to a search . . . carries with it [law enforcement's] right to examine and photocopy." United States v. Ponder, 444 F.2d 816, 818 (5th Cir. 1971.)

Appellee's act of voluntarily allowing the agents to search the phone is vastly different from producing specific contents of his phone that he first had to determine (using the contents of his mind) were responsive to a subpoena.[11] Again, it cannot be stressed strongly enough that Appellee's unlocking of the phone did not convey any information about the contents of the

[11] The fact that this case involved a consent search also distinguishes it from Bondo, unpub. op. at 14-15. In Bondo this Court found a violation of Edwards where Appellee was asked to verbally state the password to his phone which enabled the execution of a search authorization. Id. at 17-18.

phone.[12] There would be no reason in this case to make the United States show independent knowledge of facts that are not even conveyed by Appellee's act of unlocking the phone. It is sufficient that the United States can show that Appellee's ownership of the phone and knowledge of the password were foregone conclusions.

c. OSI did not rely on any "truthtelling" by Appellee to identify incriminating evidence on his phone.

In explaining why the production of the tax records in Fisher did not "rise to the level of testimony within the protection of the Fifth Amendment," the Supreme Court also emphasized that the Government had not relied on the "truthtelling" of the suspect to prove the existence of and the suspect's access to the tax records.

As in Fisher, the Government did not rely on any "truth-telling" by Appellee in order to be able to search the phone. The Government did not make use of the "truths" asserted by Appellee: that he possessed the phone and knew the password. That information was already known or self-evident, and frankly was not needed or even helpful in examining the contents of Appellee's phone for evidence. The physical act of unlocking

[12] Moreover, having password protection on one's smartphone – which is a standard feature of the phone - has completely different implications than having non-standard encryption software on one's external hard drive. The existence and nature of special encryption software and a demonstration that a defendant can unencrypt the data could arguably convey the defendant's knowledge of contraband files on the computer.

the phone enabled OSI to access the contents the phone, but the testimonial aspects of the act did not provide them with any significant information "that will assist the prosecution in uncovering evidence." Doe II, 487 U.S. at 215. This is important, because Hubbell makes clear that that the ultimate question is whether the Government "made 'derivative use' of the *testimonial aspect* of the act" of production. Hubbell, 530 U.S. at 41 (emphasis added). Here, the United States made no "derivative" use of the testimonial aspect of Appellee's act of unlocking the phone.

This fact distinguishes Appellee's case from Hubbell. The constitutional problem with the act of production in Hubbell was that Hubbell's compelled testimony confirmed the documents produced in response to the subpoena actually existed. In other words, there was *testimonial value* in the acknowledgement of the existence of the documents. After Hubbell was forced to confirm the existence of these documents, the Government then used its new-found knowledge of the same documents to prosecute him.

In this case, however, Appellee's act of providing the password and allowing the agents to search the phone had no testimonial value. It did not reveal to the Government for the first time that the phone existed. It did not confirm that any particular evidence existed on the phone. Nor did entering the password point the agents toward any particular information

contained on the phone or suggest to them where to look. Like in Doe II, the government still had to search the phone and locate evidence "by the independent labors of its officers." Doe II, 487 U.S. at 216. This was not a situation where the government was "attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself." Cf. Doe I, 465 U.S. at 614, n.12. Under such circumstances, Appellee's act of unlocking his phone was not testimonial for purposes of Edwards or for invoking the Fifth Amendment privilege against self-incrimination.

(3) Appellee's act of unlocking his phone was not incriminating.

The military judge based her ruling on the fact that "[t]he act of the accused using the passcode to unlock his phone were the contents of the accused's own mind, and a nonverbal statement supplying evidence in a link of the chain of evidence[13] designed to lead to incriminating evidence." (App. Ex. IV at 17-18.) However, this conclusion was predicated on an incorrect understanding of the law.

[13] In the "Law" section of her ruling, the military judge cited Hoffman v. United States, 341 U.S. 479, 486 (1951), which states, "[t]he privilege afforded by the [Fifth Amendment] 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." (App. Ex. IV at 10)

Appellee's act of unlocking his phone was not incriminating. There is nothing inherently incriminating about being able to unlock one's personal cell phone. The act, in and of itself, does not create any implication that a crime has been committed, and it certainly says nothing about Appellee's alleged drug use. Furthermore, it would be inappropriate to extend Fifth Amendment protections to Appellee's act of unlocking his cell phone on the grounds that the act "furnished a link in the chain of evidence needed to prosecute the claimant for a federal crime." Hoffman, 341 at 486.

There is good reason to believe that Hoffman's "link in the chain" analysis does not apply where an act or statement by a suspect merely allows law enforcement access to incriminating evidence, rather than creating a logical evidentiary link to other evidence.[14]

A narrow reading of Hoffman is consistent with military courts' prior treatment of situations where a suspect's words or actions assist or enable law enforcement to obtain incriminating evidence. For example, in United States v. Morris, 1 M.J. 352 (C.M.A. 1976), our superior Court addressed an instance where a

[14] Professor Orin Kerr has also taken a similar position in interpreting the "link in the chain" language from Hoffman. Orin Kerr, *"A Revised Approach to the Fifth Amendment and Obtaining Passcodes,"* The Volokh Conspiracy, THE WASHINGTON POST(25 September 2016) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/25/a-revised-approach-to-the-fifth-amendment-and-obtaining-passcodes/?utm_term=.d5ee71bd5e7a (Last Accessed 11 January 2017).

suspect consented to the search of his vehicle without being warned of his Miranda or Article 31 rights, and stolen property was subsequently found in his trunk. CMA acknowledged that in consenting to a search, a suspect implicitly admits to ownership or dominion and control over the property to be searched. Id. at 353. However, CMA found questions at to the ownership of the vehicle did not require rights advisement because such questions were "not designed or likely to induce an admission regarding a suspected offense."[15] Id. Indeed, in Morris, the suspect's consent to the search of his vehicle conveyed his ownership of the vehicle and allowed law enforcement to discover incriminating stolen property in the trunk. Yet, the Court did not consider the suspect's statement of consent and implicit acknowledgement of ownership to be a "link in the chain of evidence' requiring that the recovered stolen property be suppressed. Instead, the Court found no Fifth Amendment violation and no basis to suppress the stolen property. Applying that reasoning to this case, although Appellee's act of unlocking his phone implicitly communicated ownership of the phone and led the agents to find incriminating evidence on the phone, the act was not privileged under the Fifth Amendment and does not require suppression of the contents of the phone.

[15] In other words, such questions did not seek an *incriminating* response because ownership of the car, in and of itself, was not incriminating.

Similarly, in United States v. Neely, 47 C.M.R. 780 (A.F.C.M.R. 1973), OSI agents entered the suspect's room with a search warrant authorizing the search of his room for narcotics and paraphernalia. After the suspect invoked his right to counsel, the agents asked the suspect to identify which of the three lockers in the room belonged to him and to produce the key. Id. at 781. The search of the locker resulted in the discovery of incriminating evidence. Id. This Court found that the suspect's identification of his locker was not a privileged communication protected under Article 31 or Miranda because it "was only preliminary assistance in the search, which defined and limited its area, and which could have been readily defined and localized without his assistance." Id. at 782. Hence, there was no basis to suppress the evidence found in the suspect's locker. Id. 782-83. As in Morris, this Court did not determine that the suspect's act of identifying his locker provided a "link in the chain of evidence" requiring suppression of the contents of the locker. Following this Court's logic in Neely, Appellee's unlocking of his phone was preliminary assistance in the search of his phone and the fact that Appellee owned the phone was already known by law enforcement. As such, the act was not protected by the Fifth Amendment, and the Fifth Amendment does not require that the contents of the phone be suppressed. *See also* United States v. Fife, 2015 U.S. Dist.

LEXIS 89210, 49-50 (M.D. Tenn. July 9, 2015) (No violation of Fifth Amendment during a search where police asked suspect, without Miranda warnings, to identify his bedroom; suspect's identification of his room was not incriminating in and of itself. No "link in the chain" analysis was applied).[16]

The facts of this case are significantly different from Hubbell where the "link in the chain" analysis was invoked as a reason to suppress the testimonial act of production at issue. In Hubbell, the Supreme Court noted Hubbell's acknowledgement of the documents' existence, which otherwise would not have been known, allowed the Government to then use those documents to prosecute Hubbell for new crimes discovered within the documents. "The *testimonial aspect* of respondent's act of production was the first step in a chain of evidence leading to" prosecuting for new crimes discovered solely through those documents. Hubbell, 530 U.S. at 42. (emphasis added). Confirmation of the existence of the documents was an essential part of the Government's case, and Hubbell had been compelled to provide that information. In contrast, here, the only potentially "testimonial aspect" of Appellee's act of unlocking

[16] The above cases dictate against a broad reading of the "link in the chain of evidence" language in Hoffman. Thus, this Court should not interpret the language of Hoffman to extend Fifth Amendment protections to any statement by a suspect which leads or might lead to the discovery of incriminating evidence. To do so would mean that law enforcement could never ask a suspect for consent to search without implicating the Fifth Amendment. As discussed earlier in the brief, federal circuit courts have rejected such an idea, as has our superior Court. Hutchins, 72 M.J. at 299 n.9.

the phone – that Appellee owned the phone and knew the password – was not an essential part of the United States' case against Appellee. OSI already knew the information in question, and the United States would not need to introduce the act of unlocking the phone at Appellee's court-martial in order to admit the contents of the phone as evidence.

Most importantly, however, the military judge and this Court should not even need to reach the analysis of whether Appellee's act of unlocking his phone was incriminating or whether the "link in the chain" analysis applies. If an act of production has already been found to be nontestimonial, that is the end of the Fifth Amendment inquiry and no Fifth Amendment violation or Edwards violation has occurred.[17] "If a compelled statement is 'not testimonial and for that reason not protected by the privilege, it cannot become so because it will lead to incriminating evidence.'" Doe II, 487 U.S. 201, 208, n.6. *See also* United States v. Sweets, 526 F.3d 122, 127 (4th Cir. 2007) ("Whether a statement or act, the testimonial communication '*must itself* explicitly or implicitly, relate a factual assertion or disclose information that incriminates.' This requirement removes from the Fifth Amendment's protection a myriad of compelled acts that, while leading to the discovery of

[17] If the act was nontestimonial, it cannot be an "incriminating *response*" prohibited by Edwards.

incriminating evidence, do not themselves make an incriminating factual assertion.")

Very simply, as argued above, Appellee's act of unlocking his phone was not testimonial, and therefore the Fifth Amendment privilege against self-incrimination does not apply. The fact that Appellee's act of unlocking his phone led to the discovery of incriminating evidence does not suddenly convert Appellee's act into testimony or render it inadmissible under the Fifth Amendment or Edwards.

In short, Appellee's act of unlocking his phone was neither compelled, testimonial, nor incriminating. As such, the act was not privileged under the Fifth Amendment or Edwards and should not have been excluded.

(c) Even OSI's request that Appellee unlock his cell phone violated Edwards, the results of the search of the phone need not be suppressed as "fruit of the poisonous tree."

The military judge erred by suppressing the contents of Appellee's phone as the fruits of a Fifth Amendment violation. Assuming this Court found Appellee's act of unlocking his phone to be testimonial and incriminating and declined to apply the foregone conclusion doctrine, it does not follow that the fruits of the search of Appellee's phone (the phone's contents) must be suppressed. Under federal law, a Miranda or Edwards violation alone does not require the suppression of the fruits of that violation at trial; the "fruit of the poisonous tree" doctrine

does not apply to Miranda or Edwards violations where there is no evidence of actual coercion. Patane, 542 U.S. at 643-44; Henley, 984 F.2d at 1044; Maza, 73 M.J. at 528.

However, Mil. R. Evid. 305(c)(2) states "if a person suspected of an offense and subjected to custodial interrogation requests counsel, any statement made in the interrogation after such a request, *or evidence derived from the interrogation after such request*, is inadmissible against the accused unless counsel was present for the interrogation. (emphasis added.)[18] Mil. R. Evid. 305(a) provides that a statement obtained in violation of Mil. R. Evid. 305 "is involuntary and will be treated under Mil. R. Evid. 304."

Mil. R. Evid. 304(b) in turn states upon a timely motion made under Mil. R. Evid. 304, "evidence allegedly derived from a statement of the accused may not be admitted unless the military finds by a preponderance of the evidence that (1) the statement was made voluntarily, (2) the evidence was not obtained by use of the accused's statements, or (3) the evidence would have been obtained even if the statement had not been made." Mil. R. Evid. 304(b)(1)-(3).

Even if Appellee was subject to "interrogation" after requesting counsel, and Mil. R. Evid. 305(c)(2) applies, OSI did

[18] There does not appear to be any discussion in the Analysis to the Military Rules of Evidence for why the President has apparently created greater protections for military members when it comes to evidence derived from Edwards violations.

not obtain the evidence from Appellee's phone by the "use" of the statements implicit in Appellee's act of unlocking his phone. For example, assuming arguendo that Appellee's act of entering his password into the phone conveyed to OSI that the phone belonged to him and that he knew the password to the phone, OSI did not make use to such information in conducting the search of the phone. The phone was already at OSI headquarters and was known to belong to Appellee. The text messages in question were obtained by OSI's independent search of the phone, which did not rely on any of Appellee's representations about ownership or knowing the password. Under these circumstances, the contents taken from Appellee's phone were not "derived from" any interrogation of Appellee (if such interrogation even occurred) after he invoked his right to counsel. Mil. R. Evid. 305(c)(2) provides no basis to exclude the contents of Appellee's phone as "fruit of the poisonous tree." Thus, the military judge erred in suppressing the contents of Appellee's phone.

In sum, OSI's questions to Appellee about the scope of the search and their request that Appellee unlock his phone did not constitute "further interrogation" after Appellee invoked his right to counsel; the agents did not violate Edwards. Furthermore, Appellee's act of unlocking his phone did not violate the Fifth Amendment as it was neither compelled,

testimonial, nor incriminating. Under the facts and circumstances of this case, the military judge erred by finding a Fifth Amendment violation. Even assuming an Edwards violation, the "fruit of the poisonous tree" protection under Mil. R. Evid. 305(c)(2) does not apply under the facts of this case.

In light of the incorrect analysis and legal errors made by the military judge, she erred in excluding Appellee's act of unlocking his phone and in excluding evidence from Appellee's phone pursuant to the Fifth Amendment. Her ruling must be reversed and this case promptly returned for trial.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court set aside the military judge's erroneous decision to suppress Appellee's act of unlocking his phone and the contents of Appellee's phone and expeditiously remand the case to the trial court for further proceedings.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 11 January 2017.

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