

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	)	GOVERNMENT REPLY BRIEF
	)	PURSUANT TO ARTICLE 62,
	)	UCMJ
)	
v.	)	Docket No. ARMY MISC 20240455
)	
)	
Private (E-2)	)	Tried at Fort Leavenworth, Kansas on
NATHANIEL I. GILKEY,	)	14 June 2024, 22 August 2024, and
United States Army,	)	26–27 August 2024, before a general
	)	court-martial, convened by the
Appellee	)	Commander, United States Army
	)	Combined Arms Center and Fort
	)	Leavenworth, Colonel Alexander
	)	Pickands, military judge, presiding

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

Issue Presented

**WHETHER THE MILITARY JUDGE ERRED WHEN HE RULE
THAT THE BIOMETRIC UNLOCK OF THE ACCUSED’S
PHONE VIOLATED ARTICLE 31(b), UCMJ AND SUPRESSED
ITS CONTENTS.**

Argument

A. The government raised the noticed issues at trial.

Appellee contends the government is advancing arguments or theories of the evidence for the first time on appeal. (Appellee’s Br. 21–24) (citing *United States*

v. Suarez, ARMY 20170366, 2017 CCA LEXIS 631 (Army Ct. Crim. App. 27 Sep 2017) ([mem op.](#))).

However, the government properly raised the noticed issues at trial. First, despite trial counsel’s initial statement suggesting the method the accused used to unlock Phone 2 was ambiguous,¹ trial counsel subsequently requested reconsideration and argued the accused unlocked Phone 2 by facial recognition. (App. Ex. LXXI p.4; App. Ex. LXXXII; R. at 196–98). Second, trial counsel disputed the military judge’s conclusions that CID employed subterfuge and an interrogation took place. (R. at 196–98). The military judge considered these arguments in his oral and written Supplemental Ruling. (R. at 200–03; App. Ex. LXXXV p. 7). Thus, the government did not forfeit or waive the issues raised in this instant appeal.

B. There is no evidence the accused unlocked Phone 2 using a PIN code.

Appellee asserts the military judge’s ruling was not clearly erroneous, in relevant part, because “SA TH realized he needed to have the PIN code for Phone 2” and the evidence “points to appellee inputting his PIN code to unlock Phone 2.”² (Appellee’s Br. 25–26).

¹ Namely, trial counsel wrote that the government “cannot argue for or against suppression because it is unclear from the record if the Accused unlocked the phone through insertion of a code or through biometrics.” (App. Ex. LXXI p. 4).

² Notably, trial defense counsel did not make this claim, referring instead to the unlock method as the accused’s “physical response.” (App. Ex. LXII pp. 6, 12).

First, the military judge did not make this finding of fact. (App. Ex. LXXX p. 2–3, LXXXV p. 2). The military judge’s initial ruling, recitation on the record, and Supplemental Ruling omit the specific unlock method because the military judge concluded there was insufficient evidence. (App. Ex. LXXX, LXXXV; R. at 198–200). He then made a conclusion of law that the unlock method, whether by face shape, fingerprint, number or letters or symbols, or patterns drawn onto the phone, was information itself and thus, a testimonial act or statement. (App. LXXXV p. 6–7).

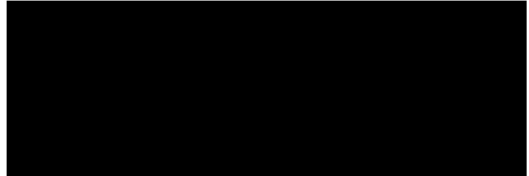
Second, this court should not find appellee’s theory persuasive. (Appellee’s Br. 25–26). Contrary to appellee’s contention, the record does not demonstrate SA TH needed the PIN code: CID successfully conducted a manual extraction of Phone 1 without a PIN and a Cellebrite logical extraction of Phone 2 after disabling its passcode. (App. Ex. LXII(a) (AIR, dtd 20 Jun 19, p. 7 of 14), (AIR, dtd 11 Feb 20, pp. 5–6 of 8)). Instead, SA TH stated in the video, “[The accused] didn’t do a swipe. He did a face. Said he didn’t remember the pass--.” (02:23–02:27). While the accused’s words to SA TH are not discernible, the video reflects the accused audibly responding to SA TH as the accused reaches for the phone. (00:36–00:43). Thus, the uncontroverted evidence before the military judge was SA TH’s statement to a fellow agent that the accused said he did not remember his passcode/PIN code and used facial recognition to unlock Phone 2.

Conclusion

WHEREFORE, the United States respectfully requests this honorable court grant its appeal and vacate the military judge's ruling.



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CERTIFICATE OF SERVICE, U.S. v. GILKEY(MISC 20240455)

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [REDACTED]
[REDACTED] on the 4th day of November, 2024.

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