

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY MISC 20240455

Private Second Class (E-2)
NATHANIEL I. GILKEY
United States Army,

Appellant

Tried at Fort Leavenworth, Kansas, on
14 June, 22 August, and 26-27 August
2024, before a general court-martial
appointed by the Commander, United
States Army Combined Arms Center
and Fort Leavenworth, Colonel
Alexander N. Pickands, military
judge, presiding.

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

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Table of Contents

Table of Contents	ii
Table of Authorities	iii
Issue Presented	Error! Bookmark not defined.
Statement of the Case	2
Statement of Jurisdiction	3
Statement of Facts	3
A. The Investigation	3
B. The Interrogation	5
C. Defense's Motion to Suppress	7
D. The Military Judges Ruling	9
E. The Government's Motion to Reconsider	11
Standard of Review	12
Law	14
A. Art. 31, UCMJ	14
B. Interrogations	16
C. Testimonial Compulsion	17
D. Testimonial Statements as Applied to Phone Unlocks	18
E. Suppression	19
Argument	20
A. The Government Very Nearly Conceded the Entire Issue at Trial	21
B. The Military Judge's Findings of Fact Had Evidentiary Support	24
C. Appellee Was Subjected to An Interrogation	28
D. Appellant Confuses the Test for Interrogation with the Test for Self-Incrimination	30
E. The Method Used to Unlock Phone 2 Was Testimonial	33
Conclusion	36

Table of Authorities

UNITED STATES SUPREME COURT

<i>Davis v. Washington</i> , 547 U.S. 813 (2006)	10, 28
<i>Doe v. United States</i> , 487 U.S. 201 (1988).....	16, 17
<i>Kokkonen v. Guardian Life Ins. Of America</i> , 511 U.S. 375 (1994)	3
<i>Hiibel v. Sixth Judicial District Court</i> , 542 U.S. 177 (2004)	n. 4
<i>Hoffman v. United States</i> , 341 U.S. 479 (1951)	17, 18, 31
<i>United States v. Hubbell</i> , 530 U.S. 27 (2000).....	17, 18, 31
<i>Miranda v. Arizona</i> , 383 U.S. 436 (1966)	16
<i>Riley v. California</i> , 573 U.S. 373 (2014)	18
<i>R.I. v. Innis</i> , 446 U.S. 291 (1980)	16, 29
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	n. 8

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

<i>Loving v. United States</i> , 62 M.J. 235 (C.A.A.F. 2005).....	3
<i>United States v. Becker</i> , 81 M.J. 483 (C.A.A.F. 2021).....	13, 28
<i>United States v. Bess</i> , 80 M.J. 1 (C.A.A.F. 2020)	14, n. 6
<i>United States v. Cossio</i> , 64 M.J. 254 (C.A.A.F. 2007).....	13
<i>United States v. Criswell</i> , 78 M.J. 136 (C.A.A.F. 2018)	14
<i>United States v. Finch</i> , 79 M.J. 389 (C.A.A.F. 2020)	14
<i>United States v. Flanner</i> , __ M.J. __, 2024 CAAF LEXIS 578 (C.A.A.F. 30 September 2024)	15, 33
<i>United States v. Henry</i> , 81 M.J. 91 (C.A.A.F. 2021).....	12
<i>United States v. Jacobsen</i> , 77 M.J. 81 (C.A.A.F. 2017).....	3
<i>United States v. Lewis</i> , 78 M.J. 447 (C.A.A.F. 2019)	12, 20, 32
<i>United States v. Mitchell</i> , 76 M.J. 413 (C.A.A.F. 2017)	10, 17, 28, 29, 31
<i>United States v. Nelson</i> , 82 M.J. 251 (C.A.A.F. 2022).....	9, 19, 32
<i>United States v. Robinson</i> , 58 M.J. 429 (C.A.A.F. 2003).....	14
<i>United States v. Robinson</i> , 77 M.J. 303, 306 n.4 (C.A.A.F. 2018)	34-35, n. 3
<i>United States v. Rodriguez</i> , 60 M.J. 239 (C.A.A.F. 2004)	n. 8
<i>United States v. Swift</i> , 53 M.J. 439, 445 (C.A.A.F. 2000).....	15
<i>United States v. Wiesen</i> , 56 M.J. 172 (C.A.A.F. 2001)	14

OTHER COURTS

<i>United States v. Byers</i> , 26 M.J. 132 (C.M.A. 1988)	16, 20
<i>United States v. Eggers</i> , 3 U.S.C.M.A. 191 (C.M.A. 1953).....	20
<i>United States v. Huelsman</i> , 27 M.J. 511 (C.M.A. 1988).....	15, 33
<i>United States v. Nowling</i> , 25 C.M.R. 362 (C.M.A. 1958).....	16
<i>United States v. Ravenel</i> , 26 M.J. 344 (C.M.A. 1988)	16
<i>United States v. Spaulding</i> , 29 M.J. 156 (C.M.A. 1989).....	20
<i>United States v. Taylor</i> , 17 C.M.R. 178 (C.M.A. 1954).....	16
<i>United States v. Williams</i> , 23 M.J. 362 (C.M.A. 1987).....	17, 20, n. 4
<i>United States v. Wilson</i> , 8 C.M.R. 48 (C.M.A. 1953)	16, 20, 33
<i>United States v. Gilkey</i> , ARMY 20210440, 2024 CCA LEXIS 46 (Army Crim. Ct. App. 19 January 2024).....	1
<i>United States v. Ironhawk</i> , ARMY 20240181, 2024 CCA LEXIS 258 (Army Ct. Crim. App. 21 June 2024).....	14
<i>United States v. Schelmetty</i> , ARMY 20150488, 2017 CCA LEXIS 445 (Army Ct. Crim. App. 30 June 2017).....	13
<i>United States v. Suarez</i> , ARMY 20170366, 2017 CCA LEXIS 631 (Army Ct. Crim. App. 27 September 2017)	13, 24
<i>United States v. Doe</i> , 670 F.3d 1335 (11th Cir. 2012)	n. 5
<i>United States v. Payne</i> , 99 F.4th 495 (9th Cir. 2024).....	22
<i>In re Application for a Search Warrant</i> , 236 F.Supp.3d 1066 (N.D. Ill. 2017)	n. 5
<i>In re Search of a Residence in Oakland</i> , 354 F. Supp. 3d 1010 (N.D. Cal. 10 January 2019).....	34, n. 5
<i>United States v. Maffei</i> , 2019 U.S.Dist.LEXIS 70314 (N. D. Cal. 2019)	n. 5
<i>United States v. Wright</i> , 431 F. Supp. 3d 1175 (D. Nev. 2020)	n. 5
<i>G.A.Q.L. v. State</i> , 257 So.3d 1058, 1061 (Fl. Ct. App. 2018)	n. 5
<i>Commonwealth v. Davis</i> , 656 Pa. 213, 220 A.3d 534 (Pa. 2019)	n. 5
<i>Seo v. State</i> , 148 N.E.3d 952 (Ind. 2019).....	n. 5
<i>State v. Andrews</i> , 234 A.3d 1254 (N.J. 2020).....	n. 5

RULES PROMULGATED BY EXECUTIVE ORDER

Mil. R. Evid. 301.....	9, 14
Mil. R. Evid. 304(b).....	32

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Appellant

Tried at Fort Leavenworth, Kansas, on 14 June, 22 August, and 26-27 August 2024,¹ before a general court-martial appointed by the Commander, United States Army Combined Arms Center and Fort Leavenworth, Colonel Alexander N. 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
RULED THAT THE BIOMETRIC UNLOCK² OF THE
ACCUSED’S PHONE VIOLATED ARTICLE 31(b), UCMJ AND
SUPPRESSED ITS CONTENTS.**

¹ Appellee was previously tried and convicted in *Gilkey I*. On 19 January 2024, this Court set aside the findings and sentence and authorized a rehearing. *United States v. Gilkey*, ARMY 20210440, 2024 CCA LEXIS 46 (Army Crim. Ct. App. 19 January 2024).

² Contrary to the government’s framing of the issue, the military judge did not find that appellee had utilized a biometric unlock. (App. Ex. LXXX, p. 2-3; App. Ex. LXXXV, p. 3).

Statement of the Case

The appellee adopts the Statement of the Case presented by appellant with the following additions:

In *Gilkey I*, appellee was charged with one specification of impersonating an agent of the U.S. Army CID, one specification of sexual abuse of a child, one specification of obstruction of justice, two specifications of distribution of child pornography, three specifications of possession of child pornography, and one specification of production of child pornography, in violation of Articles 106, 120b, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 906, 920b, and 934. *Gilkey*, 2024 CCA LEXIS at *6. The military judge sentenced appellee to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for seven years with all periods to run concurrently, and a dishonorable discharge. *Id.*, at *11. The sentence of confinement for the additional specification of Art. 134, UCMJ, possession of child pornography was three years. *Id.*, at n. 3. On 19 January 2024, this court set aside appellee's findings of guilt and sentence and authorized a rehearing. *Id.*, at *38.

Charges against appellee were subsequently referred to a general court-martial on 5 June 2024. On 8 October 2024, the government filed its brief in support of appeal for one portion of the judge's ruling. (Gov't Br.).

Statement of Statutory Jurisdiction

The government may file an interlocutory appeal of an “order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.” UCMJ art. 62(a)(1)(B). “[T]here is a presumption against federal subject-matter jurisdiction.” *United States v. Jacobsen*, 77 M.J. 81, 85 (C.A.A.F. 2017) (citing *Kokkonen v. Guardian Life Ins. Of America*, 511 U.S. 375, 377 (1994)). “Jurisdiction is neither ‘granted nor assumed by implication.’” *Id.* (citing *Loving v. United States*, 62 M.J. 235, 244 n.60 (C.A.A.F. 2005)). “Accordingly, a court must always satisfy itself that it has jurisdiction.” *Id.* Certification by the government itself is insufficient to grant jurisdiction. *Id.*

Statement of Facts

A. The Investigation

On 7 June 2019, the Camp Humphreys, Korea, CID office contacted SA [REDACTED] a digital forensic examiner with the Computer Crime Investigative Unit at Camp Walker, Korea, to inform him that a Solider was suspected of using a fake Snapchat profile to solicit nude photographs from a minor. (App. Ex. LXII(a), p. 1). SA [REDACTED] investigation led him to request and receive a signed magistrate authorization to seize and search from appellee “evidence or instrumentalities of Art. 134.” (App. Ex. LXII(a), p. 21).

On 10 June 2019, SA [REDACTED] seized appellee's Samsung Galaxy S9 (Phone 1). (App. Ex. LXII(a), p. 9). Appellee was warned of his rights under Article 31, UCMJ, which he waived, before being interrogated by law enforcement. (App. Ex. LXII(a), p. 11). During the interrogation, SA [REDACTED] requested the PIN code for Phone 1, which appellee attempted to provide, but none of them unlocked Phone 1. (App. Ex. LXII(a), p. 11-13). SA [REDACTED] had appellee unlock Phone 1 using the facial recognition feature. (App. Ex. LXII(a), p. 11-13). However, because SA [REDACTED] did not have the PIN code to Phone 1, he was unable to pull an extraction from appellee's phone using Cellebrite. (App. Ex. LXII(a), p. 14).

On 15 January 2020, charges were preferred against appellee based off evidence obtained by law enforcement, including from Phone 1. (App. Ex. LXII(a); Charge Sheet). Appellee's company commander, CPT [REDACTED] preferred the charges. (App. Ex. LXII; Charge Sheet).

On 6 February 2020, SA [REDACTED] received an email from Mega Cloud Services' compliance department. (App. Ex. LXII(a), p. 40-43). Prior investigation had revealed potential child pornography associated with a Mega account linked to appellee. (App. Ex. LXII(a), p. 40-43). The 6 February 2020 email included login information from a different Samsung Galaxy S9 [Phone 2] than the already seized Phone 1. (App. Ex. LXII(a), p. 40-43). Later that day, SA [REDACTED] received a magistrate authorization to seize and search Phone 2. (App. Ex. LXII(a), p. 47-59).

On 6 or 7 February 2020, SA [REDACTED] met with CPT [REDACTED] to discuss how they would execute the magistrate authorization for Phone 2. (App. Ex. LXII(a), p. 44). While meeting, SA [REDACTED] and CPT [REDACTED] also reached out to appellee's supervisor, who told them he believed appellee kept the number for his defense counsel on his phone. (App. Ex. LXII(a), p. 44). Neither SA [REDACTED] nor appellee's commander attempted to contact the local Trial Defense Service office, the unit chief of justice, or any government counsel assigned to the case to attempt to contact appellee's defense counsel.

B. The Interrogation

On 7 February 2020, appellee was part of a work detail. (App. Ex. LXII(a), p. 43-44). Special Agent [REDACTED] and SA [REDACTED] along with others, including CPT [REDACTED] drove to where appellee was performing his duties. (App. Ex. LXII(b), at 00.00.09). What happened next was captured on SA [REDACTED] bodycam. (App. Ex. LXII(b)).

"Gilkey, stop where you are," ordered SA [REDACTED] (App. Ex. LXII(b), at 00.00.01). "Can I see your phone please?" asked SA [REDACTED] (App. Ex. LXII(b), at 00.00.09). "Do you remember me?" SA [REDACTED] stated, before showing his credentials. (App. Ex. LXII(b)). By this point, SA [REDACTED] had taken appellee's phone and was holding it. (App. Ex. LXII(b), at 00.00.22). "Remember the last time we spoke was the last time you were arrested, ok; the reason why I am here right now is because

there's a warrant for your phone," stated SA [REDACTED] (App. Ex. LXII(b)). "Now I understand you have an attorney, right, a defense attorney, do you need the number, go ahead." asked SA [REDACTED] (App. Ex. LXII(b), at 00.00.34). Special Agent [REDACTED] gave appellee his phone back. (App. Ex. LXII(b), at 00.00.43). "Just take the number out please," ordered SA [REDACTED] (App. Ex. LXII(b), at 00.00.47). "I don't have a pen on me," replied appellee. (App. Ex. LXII(b), at 00.00.48).

Appellee looked through Phone 2 for a moment, saying nothing, before SA [REDACTED] asked "where's the phone number?" (App. Ex. LXII(b), at 00.00.50-00.00.11). Appellee apparently located his defense counsel's number, and SA [REDACTED] then took Phone 2 from him and had SA [REDACTED] read it to SA [REDACTED] (App. Ex. LXII(b), at 00.01.14). SA [REDACTED] told appellee they would not talk to appellee but would pass the number for appellee's defense counsel to CPT [REDACTED] (App. Ex. LXII(b), at 00.01.34). SA [REDACTED] then gave appellee a copy of the search authorization. (App. Ex. LXII(b), at 00.01.34). SA [REDACTED] released appellee back to his commander. (App. Ex. LXII(b), at 00.01.58). SA [REDACTED] told CPT [REDACTED] that "we will be in touch with you later today." (App. Ex. LXII(b), at 00.02.08). The two agents returned to their vehicle and SA [REDACTED] asked: "did you see what he used?" to which SA [REDACTED] responded: "he didn't do a swipe, he did a face, said he didn't remember the pass" (App. Ex. LXII(b), at 00.02.15). At this point, the bodycam footage ended.

During the interrogation, appellee never stated that he “could not remember” the PIN code to Phone 2. Neither were there were any words or gestures of appellee consistent with him being unable to use his PIN code to unlock his phone. At no point in this interrogation was appellee warned of his rights under Article 31(b), UCMJ.

The same day, SA [REDACTED] successfully performed an extraction using Cellebrite UFED, the same equipment that had previously proven unable to perform an extraction on Phone 1, even though they were the exact same model. (App. Ex. LXII(a), p. 44). SA [REDACTED] found digital evidence on Phone 2, which became the evidentiary basis for the additional charge of Article 134 preferred against appellee on 1 May 2020. (App. Ex. LXII(a), p. 44; Charge Sheet).

C. Defense’s Motion to Suppress

Prior to trial, on 31 July 2024, appellee moved to suppress the contents of Phone 2, asserting that the seizure had violated appellee’s Fifth Amendment right against self-incrimination. (App. Ex. LXII, p. 11-13). Appellee argued the seizure had amounted to an interrogation, SA [REDACTED] questions regarding appellee’s defense counsel had been a ruse used to get him to reveal the method of unlocking his phone, and appellee’s opening his phone was a testimonial and incriminating act. (App. Ex. LXII, p. 11-13).

In its five-page response, the government concurred “with the facts and evidence as laid out by the defense.” (App. Ex. LXXI). The government cited *State v. Diamond*, 905 N.W.2d 870 (S. Ct. Mn. 2018), a Minnesota case, to seemingly suggest that biometric unlocks are not protected acts under the Fifth Amendment. (App. Ex. LXXI) (“The differentiating factor is one shows what you know and confirms that knowledge is connected to the phone, while the other is a non-action.”). The government

cannot argue for or against suppression because it is unclear from the record if the [a]ccused unlocked the phone through insertion of a code or through biometrics . . . [t]he [g]overnment will look deeper into the original recordings made by law enforcement and share that information with opposing counsel and file a supplemental brief as soon as practicable with the Court.

(App. Ex. LXXI, p. 4).

On 26 August 2024, the military judge held an Article 39(a) session to litigate the appellee’s suppression motion. (R. at 33). The government called no witnesses nor introduced any evidence. (R. at 37). The military judge announced he was granting appellee’s motion to suppress the contents of Phone 2. (R. at 37).

Later that day, the government stated it intended on filing a motion to reconsider the military judge’s ruling to suppress Phone 2. (R. at 46). The government asked to call a witness in support of its motion for reconsideration. (R. at 46). The court-martial then proceeded with voir dire and the members were impaneled. (R. at 190).

D. The Military Judge's Ruling

Also that day, the military judge issued a written ruling granting defense's motion to suppress the contents of Phone 2. (App. Ex. LXXX). The military judge found that SA ■■■ had coordinated with CPT ■■■ appellee's commander, to execute the search authorization for Phone 2. (App. Ex. LXXX, p. 2). The military judge also found SA ■■■ did not warn appellee of his Article 31(b) rights and yet asked appellee if he had Phone 2 on him and to retrieve his defense counsel's phone number from Phone 2 (App. Ex. LXXX, p. 2-3). The military judge also found that after appellee had unlocked Phone 2, SA ■■■ took the unlocked phone. (App. Ex. LXXX, p. 3).

In his conclusions of law, the military judge found "the right against self-incrimination contained in the Constitution, statute, and the M.R.E. [applies] 'only to evidence of a testimonial or communicative nature'" . . . [or] 'testimonial compulsion.'" (App. Ex. LXXX, p. 5) (citing Mil. R. Evid. 301(a); *United States v. Nelson*, 82 M.J. 251, 255 (C.A.A.F. 2022)). The military judge noted military courts had not explicitly determined whether phone unlocks constitute testimonial acts, but the Court of Appeals of the Armed Forces (CAAF) "has expressed support for this proposition," while acknowledging that ultimately the CAAF had avoided answering the question by instead finding a right to counsel violation.

(App. Ex. LXXX, p. 8-9) (citing *United States v. Mitchell*, 76 M.J. 413, 418 (C.A.A.F. 2017)).

After acknowledging that military courts had not definitively held that phone unlocks were testimonial, the military judge looked to *Davis v. Washington*, 547 U.S. 813, 822 (2006) for the proposition that phone unlocks *are* testimonial acts if “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (App. Ex. LXXX, p. 9). Comparing *Davis* to *Mitchell*, the military judge found that the Phone 2 unlock had “furnish[ed] a link in the chain of evidence needed to prosecute” and that SA [REDACTED] “interrogated [appellee] by attempting to elicit incriminating evidence from him.” (App. Ex. LXXX, p. 9). The military judge concluded that SA [REDACTED] should have given appellee an Article 31(b) rights advisal as SA [REDACTED] suspected appellee of committing the offense of possession of child pornography. (App. Ex. LXXX, p. 11).

The military judge also made additional findings of fact, namely that there was no evidence that SA [REDACTED] had “directed appellee to write the number down or call his attorney . . . and instead immediately took the unlocked phone.” (App. Ex. LXXX, p. 13).

E. The Government's Motion to Reconsider

Also, later that day, the government moved for reconsideration, but in doing so cited no new facts or evidence; instead, the government notified the military judge it intended to offer the testimony of SA [REDACTED] (App. Ex. LXXXII, p. 1). The government again argued that asking appellee to “open his phone *by using his face* is not an interrogation and does not trigger the protections of the Fifth Amendment.” (App. Ex. LXXXII, p. 3) (emphasis in original).

The next day, on 27 August 2024, just prior to opening statements before the panel, the military judge allowed the government to argue for reconsideration. (R. at 194). Again, the government declined to call any witnesses, including SA [REDACTED] even after specifically requesting to do so the day prior. (R. at 195). When asked specifically what in the court's findings was unsupported by a preponderance of the evidence, the government responded, “there was nothing within the stipulated facts that the accused removed his phone number from the phone.” (R. at 196). The judge stated, “I don't believe you've actually disputed any of the facts iterated in my ruling.” (R. at 196). “No, your honor,” was the government's response.

The government then argued that “military courts have not had the occasion to differentiate between PIN codes and biometric data,” but that civilian courts had made a distinction. (R. at 197). The government argued that “the act of holding one's phone up to one's face technically is not a statement.” (R. at 198).

The military judge then gave an oral recitation of his findings of fact. (R. at 198-200). The military judge noted SA [REDACTED] did not appear to take the opportunity to give appellee's defense counsel's number to CPT [REDACTED] even though he said he would, and that after the two agents returned to their vehicle the agent's discussed the manner in which appellee unlocked his phone. (R. at 200). The government agreed this was an accurate summary of the facts and that SA [REDACTED] testimony would have been consistent with the military judge's findings of fact. (R. at 200).

The military judge denied reconsideration, finding the purpose of the agents' dialogue with appellee was to get him to unlock his phone. The agents did not provide the number to appellant, did not need the number themselves, CPT [REDACTED] did not need the number, and it was not clear from the video that the agents even provided it to CPT [REDACTED] (R. at 202).

After a recess, the government submitted its notice of appeal under Article 62, UCMJ. On 29 August 2024, the military judge issued extensive supplemental findings of fact and conclusions of law. (App. Ex. LXXXV).

Standard of Review

"In an Article 62 appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial." *United States v. Henry*, 81 M.J. 91, 95 (C.A.A.F. 2021) (quoting *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2019)). Pursuant to

Article 62, UCMJ, this court may act “only with respect to matters of law.” *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). This court may not “find its own facts or substitute its own interpretation of the facts.” *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021). This court also cannot notice waived or forfeited issues when a case is on interlocutory appeal. *United States v. Suarez*, ARMY 20170366, 2017 CCA LEXIS 631, *10 (Army Ct. Crim. App. 27 September 2017) (mem op.). In reviewing whether the military judge erred, this court may only consider the “facts and legal theories of the case that had been brought to his attention at the time.” *Id.* at *11, (citing *United States v. Schelmetty*, ARMY 20150488, 2017 CCA LEXIS 445 (Army Ct. Crim. App. 30 June 2017) (mem. op.)). This court may not “consider arguments or theories of the evidence that were advanced for the first time on appeal.” *Id.* Therefore, “when the government concedes an issue at trial and the military judge accepts the concession, then the government cannot complain to this court that the military judge erred.” *Id.* at *12.

This court is "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous." *Becker*, 81 M.J. at 489. "A finding of fact is clearly erroneous when there is *no* evidence to support the finding, or when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has

been committed." *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018) (emphasis added). "[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted." *United States v. Finch*, 79 M.J. 389, 391 (C.A.A.F. 2020).

A military judge's conclusions of law are reviewed de novo. *United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003) However, even if this court finds that a military judge erred in his conclusions of law, this court "will sustain a military judge's evidentiary ruling if it reaches the correct result, but for different reasons." *United States v. Ironhawk*, ARMY 20240181, 2024 CCA LEXIS 258, *4 (Army Ct. Crim. App. 21 June 2024) (summ. disp.) (citing *United States v. Bess*, 80 M.J. 1, 11-12 (C.A.A.F. 2020) (internal citation omitted)).

Law

A. Article 31, UCMJ

"When a statute or rule confers a right greater than the Constitution, an accused is entitled to the benefit of that greater right, unless it conflicts with a higher source of law." *United States v. Wiesen*, 56 M.J. 172, 177 (C.A.A.F. 2001); *see also* Mil. R. Evid. 301(a) ("An individual may claim the most favorable privilege provided by the Fifth Amendment . . . Art. 31, or these rules."). "A servicemember's protection against compulsory self-incrimination is unparalleled in the civilian sector because '[t]his fundamental right is protected by both the Fifth

Amendment and Article 31, UCMJ.” *United States v. Flanner*, __ M.J. ___, 2024 CAAF LEXIS 578, at *20 (C.A.A.F. 30 September 2024).

No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial .

Art. 31(b), UCMJ, 10 U.S.C. § 831(b).

“The purpose of the Article 31(b), UCMJ, warning requirement is to provide ‘members of the armed forces with statutory assurance that the standard military requirement for a full and complete response to a superior's inquiry does not apply in a situation when the privilege against self-incrimination may be invoked.’”

Flanner, __ M.J. ___, 2024 CAAF LEXIS 578, at *2 (citing *United States v. Swift*, 53 M.J. 439, 445 (C.A.A.F. 2000)). Unlike *Miranda* warnings, Article 31(b) warnings must be given to anyone "suspected of an offense," regardless of whether they are “subject to custodial interrogation.” *Id.* Once investigators receive information that a person may have committed an offense, that person is a suspect and Article 31 mandates that the suspect “be advised in accordance with Art. 31(a) and (b).” *United States v. Huelsman*, 27 M.J. 511, 514 (C.M.A. 1988).

B. Interrogations

The provisions of Article 31(b) and (d) “accord an accused even broader protection than the Fifth Amendment of the United States Constitution and may apply in situations far more subtle than the custodial interrogation situation defined by the Supreme Court in *Miranda*.” *United States v. Ravenel*, 26 M.J. 344, 348 (C.M.A. 1988) (citing *Miranda v. Arizona*, 383 U.S. 436 (1966)). “Thus, a single question may constitute interrogation or a request for a statement.” *United States v. Byers*, 26 M.J. 132, 134 (C.M.A. 1988) (citing, e.g. *United States v. Wilson*, 8 C.M.R. 48 (C.M.A. 1953)); *United States v. Taylor*, 17 C.M.R. 178 (C.M.A. 1954) (a statement may include identification of clothing); *United States v. Nowling*, 25 C.M.R. 362 (C.M.A. 1958) (a statement may include pulling out a pass).

In the Fifth Amendment context, 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.” *R.I. v. Innis*, 446 U.S. 291, 301 (1980). “Compelled testimony that communicates information that may ‘lead to incriminating evidence’ is privileged even if the information itself is not inculpatory.” *Doe v. United States*, 487 U.S. 201, 208 n.6 (1988).

The CAAF has held that requests for a suspect’s smartphone PIN code subsequent to an execution of a valid search and seizure authorization is an

interrogation, an “express question, reasonably likely to elicit an incriminating response.” *Mitchell*, 76 M.J. at 419.³ In *Mitchell*, the CAAF held that unlike a mere request to search, the accused was asked “to provide the Government with the passcode itself, which is incriminating information in the Fifth Amendment sense, and thus privileged.” *Id.* The CAAF noted that “[t]he privilege . . . not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute.” *Id.* (citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951)); *see also United States v. Hubbell*, 530 U.S. 27, 37-38 (2000). “By asking Appellee to enter his passcode, the Government was seeking an ‘answer[] . . . which would furnish a link in the chain of evidence needed to prosecute’ in the same way that *Hoffman* and *Hubbell* used the phrase.” *Id.*

C. Testimonial Compulsion

“Article 31, like the Fifth Amendment, focuses on testimonial compulsion.” *United States v. Williams*, 23 M.J. 362, 366 (C.M.A. 1987). “[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.” *Doe*, 487 U.S. at 210. Fifth

³ *Cf. United States v. Robinson*, 77 M.J. 303, 306 n.4 (C.A.A.F. 2018) (in a case where appellant had consented to the search of his phone prior to investigators requesting his PIN code, the court distinguished *Mitchell*, noting that “*Mitchell* involved a search authorization of the accused's cell phone . . . rather than a voluntary consent to search, as here.”).

Amendment “protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.” *Hubbell*, 530 U.S. at 37. The privilege extends to answers “that would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.” *Hoffman* 41 U.S. at 486. “Compelled testimony that communicates information that may ‘lead to incriminating evidence’ is privileged even if the information itself is not inculpatory.” *Hubbell*, 530 M.J. at 38.⁴

D. Testimonial Statements as Applied to Phone Unlocks

Cell phones are tantamount to “minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.” *Riley v. California*, 573 U.S. 373, 393 (2014). Therefore, the “United States Supreme Court recently instructed courts to adopt

⁴ However, “under some circumstances, the words spoken or written by an accused may be received in evidence even though they were taken by an investigator without any Article 31(b) . . . warning.” *Williams*, 23 M.J. at 366. For instance, handwriting and voice exemplars, because the content is irrelevant, only how they were said or written, are not testimonial statements protected by Article 31. *Id.* Additionally, statements that are responses to common administrative questions, especially in the context of *Terry* stops, like giving one’s name or furnishing identification, may also be non-testimonial. *See Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, 189 (2004).

rules that 'take account of more sophisticated systems that are already in use or in development.'" *Id.* (citing *Carpenter*, 585 U.S. at 313).

Neither the CAAF nor the Supreme Court have decided whether an appellant unlocking his cell phone is incriminating and testimonial. *See Nelson*, 82 M.J. at n.5. However, numerous federal and state courts have taken up the question, with many holding that PIN codes, passwords, and even biometric unlocks, such as thumbprint and facial recognition unlocks, are incriminating and testimonial speech covered by the Fifth Amendment.⁵

E. Suppression

Article 31(b) and (d) expressly require “warning before any information relating to a suspected offense may be sought—and also provides that information

⁵ *See United States v. Doe*, 670 F.3d 1335, 1346 (11th Cir. 2012); *In re Application for a Search Warrant*, 236 F.Supp.3d 1066, 1073 (N.D. Ill. 2017) (finding the requirement to unlock a phone with a fingerprint was a testimonial act); *Oakland*, 354 F. Supp. 3d at 1016 (finding a fingerprint unlock of defendant’s phone was testimonial); *United States v. Wright*, 431 F. Supp. 3d 1175 (D. Nev. 2020) (finding a compelled facial recognition unlock was testimonial, “especially in a prosecution for possession of child pornography, where possession is an essential element of the offense.”); *United States v. Maffei*, 2019 U.S. Dist. LEXIS 70314, *17-8 (N. D. Cal. 2019) (finding the defendant’s provision of a biometric unlock or passcode qualifies as a testimonial communication as “telling an inquisitor the combination to a wall safe.”); *State v. Andrews*, 234 A.3d 1254 (N.J. 2020) (noting a cellphone’s passcode is like the combination to a safe, not a key); *Seo v. State*, 148 N.E.3d 952 (Ind. 2019); *Commonwealth v. Davis*, 656 Pa. 213, 220 A.3d 534 (Pa. 2019) (holding the Fifth Amendment did protect against compelled disclosure of a computer password); *G.A.Q.L. v. State*, 257 So.3d 1058, 1061 (Fl. Ct. App. 2018).

secured without such warning is inadmissible in evidence.” *United States v. Eggers*, 3 U.S.C.M.A. 191, 195-6 (C.M.A. 1953). “A statement is ‘involuntary’ if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, *Article 31*, or through the use of coercion, unlawful influence, or unlawful inducement.” *United States v. Spaulding*, 29 M.J. 156, 161 (C.M.A. 1989) (emphasis added); *see also Lewis*, 78 M.J. at 452-53.

Admission of statements arising from interrogations in which the suspect was not given an Article 31(b) warning is error. *United States v. Wilson*, 8 C.M.R. 48, 54 (C.M.A. 1953); *Williams*, 23 M.J. at 366-67 (noting that unwarned statements, in which the content of the statements were relevant, should be suppressed); *Byers*, 16 M.J. at 135 (holding that before attempting directly or indirectly to induce the making of a statement the investigator should give the warnings).

Argument

CID’s questions of appellee were intended to elicit incriminating, testimonial evidence from him in the form of his phone unlock, and therefore qualified as an interrogation. As appellee was suspected of committing an offense punishable under the UCMJ, CID had a responsibility to warn him of his Art. 31(b) rights prior to questioning him. The military judge’s findings of fact are supported

by the record and therefore are not clearly erroneous. Additionally, the military judge's conclusions of law, namely that appellee's act of unlocking his phone in response to CID's interrogation was testimonial, are supported by current-state of the relevant case law and therefore this court should deny the government's appeal.

A. The Government Very Nearly Conceded the Entire Issue at Trial

The government at trial concurred with appellee's statement of facts. (App. Ex. LXXI, p. 1). Moreover, when given multiple opportunities to dispute any facts adduced by appellee, the government repeatedly stated they had no disputes, even on reconsideration. (R. at 37, 196). The government agreed with the military judge's factual findings. (R. at 200). When given an opportunity to offer additional evidence or rebut appellee's assertions both in oral argument and in their motion to reconsider—the government did neither. (App. Ex. LXXXII; R. at 195). In their written response, the government stated they: “cannot argue for or against suppression,” because they were unsure how appellee had unlocked Phone 2. (App. Ex. LXXI, p. 4). The government stated they would “look deeper into the original recording,” in order to divine by which means Phone 2 had been unlocked. (App. Ex. LXXI, p. 4). Why the government could not review all two minutes of the bodycam footage prior to filing its response remains mysterious. It's not unreasonable to assume that they did review the footage, but they did not like what they saw.

With these statements, along with the entire tenor of their response, the government is implicitly conceding that PIN code unlocks of phones are incriminating, testimonial acts covered by the Fifth Amendment. Moreover, this statement reveals that even to the government at trial, the video evidence was at the very least ambiguous as to how appellee opened his phone. And the government bore the burden of showing appellee's rights were not violated in the course of the search and seizure. (App. Ex. LXII, p. 1-2; App. Ex. LXXI, p. 1)

In the government's motion for reconsideration, the government argued that *Mitchell* did not extend to facial recognition unlocks. (App. Ex. LXII, p. 2-3). The government further argued that SA [REDACTED] had not interrogated appellee because appellee had "identified the number within his phone;" how that proved the lack of an interrogation was not elaborated. (App. Ex. LXII, p. 3). Finally, the government cited to *United States v. Payne*, 99 F.4th 495 (9th Cir. 2024), to suggest that biometric unlocks are non-testimonial. (App. Ex. LXII, p. 2). This argument, together with the government's earlier concession in its first response ("the [g]overnment cannot argue for or against suppression because it is unclear from the record if the [a]ccused unlocked the phone through insertion of a code or through biometrics") suggests that the government conceded that a PIN code unlock is an incriminating, testimonial act triggering Fifth Amendment protection. Although the government in their motion for reconsideration seemed to argue that

appellee had in fact unlocked his phone through biometrics, they provided no evidence to support this proposition—one that ran counter to its earlier concession that it did not know how appellee unlocked his phone. But the government still failed to carry—indeed address—its burden to show appellee was not questioned in violation of Article 31, UCMJ.

In its appeal, the government states the military judge was “bent on fitting the evidence to his predetermined conclusion.” (Gov’t Br. 25-26). However, at trial the government did nothing to rebut any finding of bad faith on the part of the military judge. When repeatedly given the opportunity to call witnesses to address the subject search and seizure, the government did not. When faced with the suppression of evidence relating to one of the specifications, the government at trial instead did nothing to rebut the defense’s factual claims or legal arguments, and yet now the government on appeal expects this court to save it from its cavalier conduct at trial.

On an Article 62 appeal, this court may not “consider arguments or theories of the evidence that were advanced for the first time on appeal.” *Suarez*, 2017 CCA LEXIS at *10. The government now complains of many alleged factual errors. But the government stipulated to these facts at trial. “[W]hen the government concedes an issue at trial and the military judge accepts the concession, then the government cannot complain to this court that the military

judge erred.” *Id.* at *12. And the government did not complain at trial about the military judge’s findings of fact. It is now too late for the government to complain.

B. The Military Judge’s Findings of Fact Had Evidentiary Support

In its brief, for the first time, the government alleges two erroneous findings of fact that are nearly synonymous, first, that SA [REDACTED] asked appellee to *open* his phone and second, that SA [REDACTED] had asked appellee to *unlock* his phone. This first finding located in paragraph 11 of the military judge’s original findings of fact is obviously not meant to be read as a quote from SA [REDACTED] but as a summary of the heart of what SA [REDACTED] was asking of appellee. (App. Ex. LXXX, p. 3). The government’s demand for a finding of fact that reads as a verbatim transcription is absurdly pedantic.

The second alleged “erroneous” finding, that SA [REDACTED] asked appellee to unlock his phone, is nowhere found in the military judge’s supplemental findings; in fact, the military judge states that SA [REDACTED] *did not* explicitly ask appellee to unlock his phone. (App. Ex. LXXXV, p. 6).

The government next claims that the military judge erred by finding that SA [REDACTED] requested appellee “just take the number out please.” (Gov’t Br. 24). However, the military judge was directly quoting the bodycam footage. (App. Ex. LXII(b), at 00.00.47). The government doesn’t elaborate on how exactly this is an erroneous finding.

The government also takes newfound umbrage with the military judge's supplemental findings that "there is insufficient evidence to determine by what method the phone was unlocked." (App. Ex. LXXXIV, p. 7). The government suggests SA [REDACTED] statement at the end of the bodycam footage that appellee "didn't do a swipe, he did a face, said he didn't remember the pass . . ." is "uncontroverted evidence [that appellee] used his face to unlock the phone." (Gov't Br. 25). But nowhere in the bodycam footage does appellee say he "didn't remember his pass[code]." When this statement likely would have been made, the camera is within one foot of appellee and not only is he not heard but his lips do not even move. (App. Ex. LXII(b), at 00.00.50-00.001.14). Moreover, appellee made no gestures to suggest how he unlocked his phone and his hands are not visible at the time when he was opening his phone.

When SA [REDACTED] first interviewed appellee, he provided an Article 31(b) rights warning before requesting appellee's PIN code for Phone 1. (App. Ex. LXII(a), p. 11-3; App. Ex. LXXX, p. 2). When appellee did not give SA [REDACTED] the PIN code, but instead used the facial recognition unlock instead, SA [REDACTED] was unable to perform an extraction of the device without the PIN code. (App. Ex. LXII(a), p. 14; App. Ex. LXXX, p. 2). However, when SA [REDACTED] seized Phone 2 without providing an Article 31(b) rights warning, he was able to perform an extraction. (App. Ex. LXII(a), p. 44). Phones 1 and 2 are the exact same model of phone.

A reasonable interpretation of these facts is that SA [REDACTED] realized he needed to have the PIN code for Phone 2, so SA [REDACTED] decided not to provide an Article 31(b) warning and instead ask for appellee's PIN code in a surreptitious way. Although SA [REDACTED] suggested that facial recognition was used to open the phone, the rest of the evidence—the lack of a statement from appellee, stating he “couldn't remember his pass[code];” the inability of SA [REDACTED] to perform an extraction on the exact same model of phone without a PIN code; and the odd concern for defense counsel's phone number—points to appellee inputting his PIN code to unlock Phone 2. At the very least, the military judge's finding of fact is not clearly erroneous.

The government picks other newly discovered nits: SA [REDACTED] “did not write [the number] down or provide it to [the accused]” and SA [REDACTED] made a “demonstration of” writing down the number. (Gov't Br. 25-26). However, the military judge's findings dispel these claims of error. For the first nit, the military judge is referring to the fact SA [REDACTED] is never seen in the bodycam footage giving appellee his counsel's number. (App. Ex. LXXX, p. 5; App. Ex. LXII(b), at 00.01.34-00.01.58). The second nit is simply a misreading of the military judge's supplemental findings. The military judge states: “They had copied the number down or made a demonstration of doing so on the video but did not provide it to

the Accused.” (App. Ex. LXXXV, p. 3). The military judge’s findings are not contradictory or clearly erroneous.

Finally, the government claims the military judge’s finding that SA [REDACTED] “immediately took the unlocked phone” is clearly erroneous. (Gov’t Br. 26). But the military judge actually found that SA [REDACTED] did “not *appear* to take the opportunity to” give the number to appellee’s commander. (App. Ex. LXXX, p. 2) (emphasis added). Nothing in the video shows the opposite of the military judge’s finding, thus it is not clearly erroneous. As to the finding that SA [REDACTED] “immediately took the unlocked phone,” the military judge was stating that rather than allowing appellee an opportunity “to write the number down or call his attorney[,] [i]nstead, SA [REDACTED] immediately took the unlocked phone.” (App. Ex. LXXXII, p. 11). This court is “bound by the military judge’s factual determinations unless they are unsupported by the record or clearly erroneous.” *Becker*, 81 M.J. at 489. The government cherry-picks from the military judge’s rulings, takes them out of context, and then misinterprets them. The military judges’ findings are not clearly erroneous.

C. Appellee Was Subjected to An Interrogation⁶

The military judge, applying relevant case law, found appellee's Phone 2 unlock was an interrogation as SA [REDACTED] questions showed that "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution," and "furnish a link in the chain of evidence needed to prosecute." (App. Ex. LXXX, p. 9) (citing *Davis*, 547 U.S. at 822 and *Mitchell*, 76 M.J. at 418.). The military judge found that although SA [REDACTED] "did not directly ask [appellee] . . . to unlock the phone, his request had the same effect" . . . [since] an interrogation of a suspect includes 'not only . . . express questioning, but also . . . any words or action 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.'" (App. Ex. LXXX, p. 9) (citing *Innis*, 446 U.S. at 301).

⁶ The government also claims appellee was subject to a *Terry* stop, and thus the military judge's finding that he was in custody was erroneous. (Gov't Br. 27). This is a new argument and must be rejected. Even if not procedurally barred, here the agents were executing a magistrate authorized search and seizure. The agents were not conducting a brief investigation based off reasonable suspicion. See *United States v. Rodriguez*, 60 M.J. 239, 247 (C.A.A.F. 2004) (a *Terry* stop must be supported by reasonable suspicion of criminal activity) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Moreover, as the military judge found, the interrogation was also custodial, therefore, a *Miranda* warning should have been given. (App. Ex. LXXXV, n. 1). Even if this court finds appellee's Art. 31 rights were not violated, it can still deny this appeal based off this *Miranda* violation, as the military judge's factual findings and conclusion of law are not clearly erroneous. See *Bess*, 80 M.J. at 11-12.

Likening appellee's interrogation to that found in *Mitchell*, the military judge concluded SA [REDACTED] "tactics . . . succeeded in getting appellee to enter his passcode rather than verbally provide it . . . [and] was part of the same basic effort to convince appellee to provide the information necessary for the government to access and search the contents of the phone, and to help provide that he himself had the same ability." (App. Ex. LXXX, p. 9-10 (citing *Mitchell*, 76 M.J. at 418)).

The government asserts SA [REDACTED] first question to appellee, "do you need the number," was not likely to elicit evidence of any kind and is a normal administrative question. (Gov't Br. 12). However, the military judge found this question was not merely administrative. The government does not offer any actual administrative purpose to the question, and the government at trial, when presented with numerous opportunities to provide an administrative explanation, failed to do so. As the military judge noted, neither agent needed the defense counsel's number in order to serve the search authorization; neither expressed a desire to speak with the defense counsel. The agents had easier ways to obtain the defense counsel's information. (App. Ex. LXXXV, p. 3).

Additionally, the military judge found SA [REDACTED] only engaged appellee about his attorney's contact information once he had appellee's phone and the question "do you need the number" was meant to inspire appellee to unlock his phone. Special Agent [REDACTED] already knew appellee kept his counsel's number on his phone.

(App. Ex. LXII(a), p. 44). Special Agent [REDACTED] likely hoped appellee would open the phone when asked that question. The military judge reasonably concluded SA [REDACTED] statements and actions after the phone was unlocked showed the true purpose of the question—to acquire appellee’s method of unlocking Phone 2. (App. Ex. LXXXV, p. 2-3). That determination is not clearly erroneous.

The military judge reasonably found that nothing showed SA [REDACTED] gave appellee his counsel’s number, nor did he give it to his commander, as he said they would. (App. Ex. LXXXV, p. 2-3). Significantly, the first things the agents talked about when out of the presence of appellee was not whether appellee received his attorney’s phone number, but “did you see what he used?”, i.e., how did appellee unlock his phone. (App. Ex. LXII(b), at 00.02.15). Lastly, in their Agent’s Investigative Report, the agents nowhere noted that the questions about appellee’s counsel had an administrative function, nor did they note they provided appellee with his attorney’s number or provided the number to appellee’s commander. (App. Ex. LXII(a), p. 43-44).

D. Appellant Confuses the Test for Interrogation with the Test for Self-Incrimination

Appellant seeks to limit the plain holding of *Mitchell* by suggesting it *only* applies to interrogations in a Fifth Amendment right to counsel context. (Gov’t Br. 12-13). However, *Mitchell* did not so hold. After analyzing whether Mitchell had been in custody when asked about his cell phone’s PIN code, the CAAF turned to

the separate and distinct inquiry of whether the appellee had been subject to interrogation. *Mitchell*, 76 M.J. at 418. The CAAF held that the agent’s question “can you give us your PIN?” was one reasonably likely to elicit an incriminating response” and not a mere request to search. *Id.* The CAAF held that the passcode itself was “incriminating in the Fifth Amendment sense, and privileged.” *Id.* The CAAF cited *Hoffman*, 341 U.S. at 37-38:

[t]he privilege . . . not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute”

Id.; see also *Hubbell*, 530 U.S. at 38.

Moreover, the CAAF found that “in getting [a]ppellee to enter his passcode rather than verbally provide it, that request was part of the same basic effort to convince [a]ppellee to provide the information necessary for the [g]overnment to access and search the contents of his phone, and to help prove that he himself had the same ability (which also extends beyond a mere consent to search).” *Id.* The CAAF did not qualify its holding by limiting it only to the Fifth Amendment right to counsel context. Moreover, two cases the CAAF cited in support of its holding, *Hubbell* and *Hoffman*, each addressed interrogation in a Fifth Amendment self-incrimination context. Appellant’s attempt to create a distinction not found in *Mitchell*, *Hubbell*, or *Hoffman* is unavailing.

Appellant also claims for the Fifth Amendment privilege against self-incrimination to attach the “communication must be testimonial, incriminating, and compelled. (Gov’t Br. 14) (App. Ex. LXII(a), p. 11-13). (citing dicta in *Nelson*, 82 M.J. at 255 n.5)). Appellant ignores that, in *Nelson*, the investigators *did* provide an Article 31(b) rights advisal prior to questioning the suspect concerning his phone. *Nelson*, 82 M.J. at 256.

Nelson was not about the failure to provide the required warning under Article 31(b). If it had been, the court would have had no need to conduct an inquiry into the voluntariness of the suspect’s statements—the statements would have been *per se* involuntary under Mil. R. Evid. 304(b) (“a statement is involuntary when it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.”); *see also Lewis*, 78 M.J. at 452-53.

Article 31(b) grants servicemembers rights greater than that provided by the Fifth Amendment. Contrary to the government’s assertions, there is no requirement under Article 31 that in order for a suspect to be warned of his rights, he must be subject to a “coerced” interrogation. *See Wilson*, 8 C.M.R. at 54 (because the questioner had not prefaced his questions with an Article 31(b) rights warning, “the statements should have been excluded in accordance with Article 31(d)”). Instead,

Article 31(b) rights attach at the moment an investigator interrogates or requests a statement from the servicemember suspected of committing an offense under the UCMJ. *See* Art. 31(b), UCMJ; *Flanner*, 2024 CAAF LEXIS at *2 (warnings must be given to anyone “suspected of an offense”); *Huelsman*, 27 M.J. at 514 (once investigators have information a person has committed an offense, Article 31 mandates the suspect “be advised in accordance with Art. 31(a) and (b)”).

The military judge’s conclusion of law that appellee was interrogated is supported by *Mitchell*. And the facts of this case are arguably more aggravating than those in *Mitchell*. Here, the CID agents leveraged appellee’s right to counsel as a means to get appellee to provide the information they needed for their investigation. The military judge’s conclusion that appellee was interrogated was supported by both CAAF and Supreme Court precedent, and this court should affirm the military judge’s ruling.

E. The Method Used to Unlock Phone 2 Was Testimonial

At trial, the government conceded that appellee opening Phone 2 with a PIN code would be a testimonial act. (App. Ex. LXXI, p. 4). Similarly, the government on appeal appears to concede that a PIN code unlock of Phone 2 would qualify as a testimonial act, focusing their attention on arguing against the testimonial nature of a biometric unlock.

Regardless of the exact means by which appellee opened Phone 2, no binding authority establishes the military judge abused his discretion. Multiple jurisdictions have held that biometric unlocks are testimonial acts afforded Fifth Amendment protection. *See supra* note 4. As the Northern District of California has noted, certain acts, while incriminating, are not within the privilege because they are non-testimonial, such as “furnishing a blood sample, submitting to fingerprinting, providing a handwriting or voice exemplar, or standing in a lineup.” *In re Search of a Residence in Oakland*, 354 F. Supp. 3d 1010, 1015 (N.D. Cal. 10 January 2019) (hereinafter, *Oakland*) (citing *Doe*, 487 U.S. at 210). But biometric unlocks are distinct as they serve the exact same purpose as a PIN code, and are as such “fundamentally equivalent.” *Id.* In fact, often there are times when a “device will not accept the biometric feature and require the user to type in the passcode.” *Id.*

Here, the military judge made detailed findings of fact and conclusions of law, even taking into account the government’s citation to *United States v. Payne*, but found it unpersuasive given *Mitchell* and *Davis*. (App. Ex. LXXXV, p. 7). The government claims *Robinson* supports its argument of Phone 2’s unlock being non-testimonial. However, the cases are easily distinguishable. In *Robinson*, the appellant was properly informed of his Article 31(b) rights, waived those rights, consented to a search of his phone, and was then asked for the PIN code. 77 M.J. at

304. The government asserts “the military judge’s interpretation of *Mitchell* in this case would have incorrectly determined that the *Robinson* facts also created an interrogation.” (Gov’t Br. 21). But that claim does not account for the fact that in both *Mitchell* and *Robinson* the suspects were both provided their Article 31(b) rights prior to the investigators seeking to elicit their phone’s PIN codes.

Conclusion

SA [REDACTED] took advantage of the fact that appellee was represented by an attorney and induced him into incriminating himself. This presents a scenario similar to what the CAAF encountered in *Mitchell*. Here, the military judge correctly considered the use of these methods without a rights warning a violation of the clear precepts of Article 31(b).

The military judge did not err by finding that the circumstances of the unlock of Phone 2 were testimonial, even under a de novo standard. The military judge's factual findings and legal conclusions are not clearly erroneous.

Wherefore, appellee requests that this honorable court deny this appeal and affirm the military judge's ruling suppressing the contents of Phone 2.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Army
Court and Government Appellate Division on October 29, 2024.

A solid black rectangular box used to redact the signature of Melinda J. Johnson.

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