POINT II

THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION TO SUPPRESS THE CELL PHONE AND ITS CONTENTS HOLDING THAT THE SEARCH AUTHORIZATION AND THE CONSENT TO SEARCH WERE VALID

The trial court erred when it found that the search authorization and the consent to search were both valid. The search of Dylan's cell phone, under both Military Law and New York Law, was illegal and the cell phone and its contents should have been suppressed. The consent was not voluntary because before Dylan signed the consent form he was first told that his commanding officer, Captain McAlearney, had issued an order that he relinquish the phone and because prior to signing the consent form Dylan no longer had physical possession or control over the phone; both of these factors negate the voluntariness of the consent. The trial court erred in its choice-of-law, erred in its incorrect interpretation of Military Law, and erred when it failed to suppress the cell phone and its contents.

Dylan Flynn Has Standing Under The Fourth Amendment To Contest The Search Of His Cell Phone As He Has A Reasonable Expectation Of Privacy In The Phone And Its Contents.

Mr. Flynn has standing to contest the search of his cell phone conducted by the Naval Criminal Investigative Service ("NCIS"). Military personnel retain all rights under the constitution and have a reasonable expectation of privacy in their

cell phones under the Fourth Amendment search and seizure laws, and illegal searches are subject to the exclusionary rule under the U.S. Constitution. *Riley v. California*, 524 U.S. ____, 134 S.Ct. 2473 (2014), *United States v. Wicks*, 73 M.J. 93 (C.A.A.F. 2014); see also Military Rules of Evidence, Rule 311(a)(2). Both New York Courts and Military Courts apply the Fourth Amendment and all of its protections in search and seizure cases. In fact, Military Courts have consistently held that the Fourth Amendment protections against unreasonable searches and seizures apply to military personnel. *U.S. v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008); *U.S. v. Long*, 64 M.J. 57 (C.A.A.F. 2006).

The United States Supreme Court has recognized that there exists a reasonable expectation of privacy in one's cell phone. *Riley v. California*, 524 U.S. ____, 134 S.Ct. 2473 (2014). In *Riley*, the Supreme Court held that there is a more substantial privacy interest at stake when digital data is involved and that cell phones, in particular, differ in both a quantitative and qualitative sense from other objects. Because of the cell phone's immense storage capacity, a search of the contents of a cell phone is not limited by physical realities. The cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record, and the data capacity for cell phones can

date back for years. This distinct privacy right in the content of one's cell phone, as set out in *Riley*, is recognized in both New York Courts and Military Courts. *People v. Marinez*, 121 A.D.3d 423 (1st Dept. 2014); *People v. Magee*, 135 A.D.3d 1176 (3rd Dept. 2016); *U.S. v. Nieto*, 76 M.J. 101 (C.A.A.F. 2017).

Dylan Flynn's reasonable expectation of privacy in his cell phone is universally recognized by all courts throughout the United States, including New York Courts and Military Courts, and he has standing under the Fourth Amendment and under Article 1 Section 12 of the New York State Constitution to contest the search of his cell phone.

The Trial Court Erred When It Failed To Suppress The Video Evidence Because There Was No Probable Cause To Issue A Search Authorization As There Was No Factual Nexus Between The Crime Alleged And The Contents Of The Phone.

The trial court erred when it failed to suppress the video evidence obtained from Mr. Flynn's cell phone because there was no nexus between the alleged crime committed and the evidence sought on Mr. Flynn's phone. The search authorization for the phone was, therefore, not supported by probable cause and the ensuing search was illegal.

New York Courts And Military Courts Require Probable Cause To Search A Cell Phone.

The Fourth Amendment of the U.S. Constitution and Article 1 Section 6 of the New York State Constitution provide that no warrants shall issue but upon probable cause, supported by Oath or affirmation. *Aguilar v. Texas*, 378 U.S. 108 (1964); *People v. Nieves*, 36 N.Y.2d 396 (1975).

New York Courts have consistently held that where a cell phone is to be searched, a search warrant supported by probable cause must be issued. *People v. Marinez*, 121 A.D.3d 423 (1st Dept. 2014); *People v. Moxley*, 137 A.D.3d 1655 (4th Dept. 2016); *People v. Victor*, 139 A.D.3d 1102 (3rd Dept. 2016); *People v. Burdine*, 147 A.D.3d 1471 (4th Dept. 2017). In each of these cases where no search warrant was issued, the evidence garnered from a cell phone and without a search warrant was suppressed.

Similarly, in military courts, the Military Rules of Evidence, Rule 315(f), requires that probable cause exist for the signing and execution of a search authorization. Military Courts, interpreting both this rule and the U.S. Constitution, have consistently held that military commanders must have probable cause to issue a search authorization to search a cell phone of military personnel.

United States v. Betancourt, WL2438544 (U.S. Navy-Marine Corp. Court of Criminal Appeals June 2017); *United States v. Wicks*, 73 M.J. 93 (C.A.A.F. 2014).

The Trial Court Erred In Its Choice Of Law And Misinterpreted Military Law

In this case, the trial court erred when it found that no probable cause was necessary to execute the search. The trial court, applying military law, erroneously found that no probable cause was necessary (See Hearing decision of trial court dated July 15, 2016) reasoning that a military search authorization only required that the search be reasonable. First, as previously stated in point I, military law is not applicable in this case and, second, this was an incorrect interpretation of military law and search authorizations. Military law clearly establishes in Military Rules of Evidence 315(f) and the highest court in the military, The Court of Appeals for the Armed Forces (C.A.A.F.), has established that searches of cell phones require probable cause. See *United States v. Wicks*, 73 M.J. 93 (C.A.A.F. 2014).

To Find That Probable Cause Exists For The Search Of A Cell Phone There Must Be Some Nexus Between The Crime And The Place To Be Searched.

In order for probable cause to exist, under both New York Law and Military Law, there must be some nexus between the crime alleged and the search of a cell phone. In other words, there must be probable cause to believe that evidence of the

crime will be found in the area to be searched. The question of nexus focuses on whether the affidavit supporting the application for the warrant contains sufficient facts to support a reasonable belief that evidence of a crime will be found in the particular place to be searched. *United States v. Hoffmann*, 75 M.J. 120, 125 (C.A.A.F. 2016); *U.S. v. Clayton*, 68 M.J. 419 (C.A.A.F. 2010); *People v. Pinchback*, 82 N.Y.2d 857 (1993); *People v. Harvey*, 298 A.D.2d 527 (2d Dept. 2002).

There Was No Nexus In The Search And The Crime Alleged As There Was No Evidence Of The Crime To Be Found On The Phone

In this case, the supporting affidavit to the search authorization states only that the Navy was investigating a sexual assault that occurred on June 13, 2015 and that the woman accusing Dylan of this had sent him a text message on his phone twice and he responded back only once. The text exchange was prompted by Special Agent Kallestad of NCIS and was read by a witness at the pretrial hearing. (H25)

Other than the text messages, there was no evidence or even allegations of evidence that there were photos or videos or any other text messages other than this exchange. Neither the Command Authorization for Search and Seizure (CASS) or the supporting affidavit said anything about photos or videos or

multimedia or social media would be contained on the phone as evidence. Neither did the Permissive Authorization for Search and Seizure state that text messages or photos or videos were taken or exchanged between Dylan and the woman who was accusing him of a sexual assault. In short, there was no evidence of a crime on the phone, and the investigators had no reason to search his phone as they already had the text messages in their possession since the texts were sent at the request of Kallestad.

The requirement of both New York Courts and Military Courts that there be some nexus between the crime and the place to be searched was not met, and the text messages were not evidence of any crime.

The Search Authorization Was Not Sufficiently Particular And Was Overly Broad

The strictures of the Particularity Clause of the Fourth Amendment are applied with equal force in New York Courts and in Military Courts. Search warrants must be specific. Specificity has two aspects: particularity and breadth. Particularity is the requirement that the warrant must clearly state what is sought. *People v. Nieves*, 36 N.Y.2d 396 (1975) Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based. *People v. Yusko*, 45 A.D.2d 1043 (2d Dept. 1974);

People v. Watkins, 46 Misc3d 207 (Sup. Ct. Kings 2014). In determining whether a warrant is overbroad, courts must focus on whether there exists probable cause to support the breadth of the search that was authorized. *People v. Brown*, 96 N.Y.2d 80 (2001); *In the Matter of a Warrant for All Content and Other Information Associated with the Email Account xxxxxxx@gmail.com Maintained at Premises Controlled By Google, Inc.*, 33 F.Supp.3d 386 (S.D.N.Y. 2014).

The Fourth Amendment to the United States Constitution and section 12 of Article I of the New York State Constitution speak with one voice in requiring that search warrants particularly describe the place to be searched, and the persons or things to be seized. *People v. English*, 52 Misc. 3d 318, 321, 32 N.Y.S.3d 837, 839 (N.Y. Sup. Ct. 2016). Under New York law, particularity is required in the language of a search warrant in order that an executing officer can reasonably ascertain and identify the person or places authorized to be searched without being misled into searching any premises other than the intended location and for the things authorized to be seized. The main purpose of the particularity requirement, under both federal and state constitutional law is to prevent a wide-ranging general or exploratory search. Nothing should be left to the discretion of the searcher in executing the warrant. *People v. Nieves*, 36 N.Y.2d 396 (1975).

A warrant that authorizes a search beyond the limits supported by the probable cause established at the time of the application is overbroad and constitutionally impermissible. *People v. Yusko*, 45 A.D.2d 1043 (2d Dept. 1974).

In order to search various parts of an individual's cell phone, including audio, video, and photographic evidence, there must be some basis in fact contained within the application for the search warrant to believe there is evidence of the crime alleged contained within those particular applications of the phone (i.e. audio, video and photographic). Thus, a warrant for the search of a cellular telephone must be drafted with sufficient breadth and particularity to search the data of the phone to determine which application or file is of evidentiary value. *People v. Watkins*, 46 Misc.3d 207 (Sup. Ct. Kings Cty. 2014).

New York Courts Find That Search Warrants For Cell Phones Are Subject To Probable Cause Requirement

Since the Supreme Court issued the decision in *Riley v. California*, New York Courts have consistently held that search warrants for cell phone contents must be supported by probable cause and provide sufficient information to support a reasonable belief that evidence of a crime may be found in the cell phone. *People v. Marinez*, 121 A.D.3d 423 (1st Dept. 2014); *People v. Moxley*, 137 A.D.3d 1655 (4th Dept. 2016); *People v. Burdine*, 147 A.D.3d 1471 (4th Dept. 2017); *People v.*

Watkins, 46 Misc.3d 207 (Sup. Ct. Kings 2014); *People v. Weissman*, 46 Misc3d 171 (Sup. Ct. Kings 2014).

Although New York cases have consistently held that the supporting affidavits to search warrant applications for cell phones must contain sufficient facts to give reasonable cause to believe that specific types of files constituting evidence of a crime will be found on a cell phone *People v. Vanness*, 106 A.D.3d 1265 (3rd Dept. 2013); *People v. Phipps*, 8Misc.3d 1008(A) (Sup. Ct. Kings 2005); *People v. Watkins*, 46 Misc.3d 207 (Sup. Ct. Kings 2014), and police conducting a search that goes beyond the facts supported by affidavit will constitute an illegal and overbroad search *People v. English*, 52 Misc.3d 318, 324-325 (Sup. Ct. Bronx 2016), New York Courts have infrequently delved into the question of which legal rules and privacy interest separate one folder or file from another when the police/government/State are *already* conducting a search of a cell phone pursuant to a search warrant. The question arises: Does a search warrant or search authorization to a cell phone permit the police to search any and all files and folders on the cell phone or does it give the police limited access to search only specific files or folders?

Particularity And The Doctrine Of Overbreadth Of A Search Warrant Applied To Cell Phones

The doctrine of overbreadth represents an intersection point for probable cause and particularity principles: it recognizes that a warrant's unparticularized description of the items subject to seizure may cause it to exceed the scope of probable cause. A warrant is overbroad if its description of the objects to be seized is broader than can be justified by the probable cause upon which the warrant is based. *United States v. Wey*, ___F.Supp.3d___, 2017 WL2574026 (S.D.N.Y. 2017); *United States v. Lustyik*, 57 F.Supp.3d 213 (S.D.N.Y. 2014); *United States v. Galpin*, 720 F.3d 436, 452 (2d Cir. 2013).

In *People v. Carratu*, 194 Misc2d 595 (Sup. Ct. Nassau Cty. 2003), the court found that in view of the Fourth Amendment's particularity requirement, a warrant authorizing a search of the text files of a computer for documentary evidence pertaining to a specific crime will not authorize a search of image files containing evidence of other criminal activity. The court cited to *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999). In *Carey*, the court held that where a detective obtained a warrant to search a computer for files relating to drug sales and came across files that contained images of a sexual nature, a new warrant to open those files should have been obtained. The *Carey* Court suppressed the computer files

that were unrelated to the drug search holding that the files were beyond the scope of the search warrant and were not in plain view and were not inadvertently discovered.

Military Courts have also limited the search of a cell phone to the particular facts that support the issuance of the search warrant. In *United States v. Tienter*, 2014 WL4716290 (N.M.C.C.A. 2014), the Navy-Marine Corp. Court of Criminal Appeals held that the search of a Marine Corporal's cell phone was unreasonable under the Fourth Amendment because the scope of the search exceeded that which had been authorized in the search authorization. The phone had been seized because there was probable cause to believe the phone contained text messages, which were evidence that the Corporal in that case was distributing illegal drugs. The search that was performed exceeded the scope of the search authorization and the Special Agent found evidence of a sexual assault on his phone. The Navy Marine Corp. Court of Appeals held that subsequently found and unrelated evidence must be suppressed.

The Particularity Requirement Assumes Greater Importance Where Digital Data Is Concerned.

Where the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance. *United States v. Galpin*, 720 F.3d

436 (2d Cir. 2013). This is because the seizure of a computer hard drive can give the government possession of a vast trove of personal information about the person to whom the drive belongs, much of which may be entirely irrelevant to the criminal investigation that led to the seizure. *United States v. Ganias*, 824 F.3d 199, 217 (2d Cir. 2016). The potential for privacy violations by some unbridled, exploratory search of a hard drive is enormous and is compounded by the nature of digital storage. *Galpin*, 720 F.3d at 447. The police, in theory, could claim that the contents of every file they open was in plain view and, therefore, admissible even if they implicate the defendant in a crime not contemplated by the warrant, which presents a serious risk that every warrant for electronic information will become a general warrant, rendering the Fourth Amendment irrelevant. *United States v. Wey*, ___F.Supp.3d ___ WL2574026 (S.D.N.Y. 2017).

The Search Authorization Was Not Sufficiently Particular And The Trial Court Erred When It Failed To Suppress The Cell Phone And Its Contents.

The Search Authorization signed by Captain McLearney was not sufficiently particular and the affidavit that supported the authorization did not provide probable cause to believe that anything other than text messages would be found on the phone. The search authorization (CASS) is a form with very vague general

language and the particulars regarding what is to be searched is filled in by the NCIS investigator. (The CASS was Exhibit 1 at the pretrial hearing) However, The CASS does not state what type of search of the cell phone is permitted and whether the NCIS will be permitted to search specific files or text messages or photos or videos.

The search authorization here is a general order for a search and contains no limits. The supporting affidavit and the additional document itemizing the one text message sent by Dylan were the basis of the signing of this authorization. This general and vague language is what the particularity clause of the Fourth Amendment is designed to prohibit. If the Captain felt that the text messages were relevant evidence, then the authorization should have stated text messages. Instead, what evolved was an unbridled romp through Dylan Flynn's cell phone by investigator Greg Smith. This became evident at the hearing when forensic investigator Smith searched the cell phone and was asked about the breadth of his search:

(H129-130)

Q: And in this case, based upon the lead that you receive from Special Agent Kallestad, what kind of information were you looking for?
A: anything that indicated sexual abuse or sexual related unwanted sex acts. Anything of that nature.

Q: and did you review the entire dump?
A: yes I did.

(H132)

Q: You had both documents, both the PASS and CASS before you?
A: Yes. I don't touch evidence until I have one or both of these.
Q: In the times that you have searched your phones based on the authority provided to you by those documents, do you limit your search in any way?
A: No.

Investigator Smith was searching for one text message from Dylan, and he searched the entire contents of the phone. The entire phone was downloaded and transferred to a PDF format file where the investigator was able to look through every text file, photo, and video.

(H137)
Q: This is the PDF format?
A: This is the PDF for the entire phone. I'm going to scroll. You got messages, your phone logs, pictures. Everything is in here.
Q: And this is, approximately, how many pages of PDF?
A: 5,784.
Q: And this document contains all of the data that was extracted from Mr. Flynn's phone when you performed the extraction pursuant to this investigation, correct?
A: Correct.

Based on the general language of the search authorization, the investigator felt that he had the authorization to look through 5,784 pages of different types of files when the only evidence that the Special Agent had knowledge of, and the only

evidence that the Captain had knowledge of when he signed the search authorization, was one text message from Dylan Flynn.

The Search Was Overbroad And The Forensic Investigator Disregarded The Parameters Of The Search

The search of Dylan's cell phone was overbroad because the crime being investigated was alleged to have occurred in June of 2015 and consisted of only text messages. The video that was ultimately downloaded and viewed by Smith was from June of 2014, one year prior. The search of Dylan's cell phone was thus overbroad in terms of time because the search should not have consisted of anything that preceded June 13, 2015, and it was overbroad because there was no evidence that video was involved in the June 2015 incident. The search conducted by investigator Smith should have limited to files that contained only text messages on or after June 13, 2015.

Computer Analyst Smith Understood The Concept Of The Scope Of A Search And Deliberately Went Beyond What Was Permitted By The Search Authorization

The search conducted by the investigative computer analyst, Gregory Smith, was overbroad because he was aware of the language contained in the CASS and its supporting documents and the PASS, and he was aware that the only facts in the supporting affidavit that would support a search of Dylan's phone were the

existence of text messages from June of 2015. He knew the videos that he found and opened that led to charges in New York were from a year earlier, and not within the scope of the search authorization.

The following colloquy took place between Investigator Smith and the assistant district attorney at the pretrial suppression hearing:

(H140)

Q: Beside the evidence that were ultimately the subject of this prosecution, what, if any, other type of evidence did you bookmark?
A: Like I said, I look [sic] historical items that might be relevant to the case or of interest in any way. So, there is some text message communications between Mr. Flynn and other people that were kind of concerning, so I flagged those and let the case agent do whatever he needs to do.

Then the following colloquy took place at the pretrial hearing between analyst Smith and defense counsel:

(H150-152)

Q: Now, here's the next question. You said that you had reviewed the affidavit from Agent Kallestad, correct.
A: Correct.
Q: And the affidavit talked specifically about an incident that allegedly occurred I think June 13 of 2015, am I right?
A: Yes.
Q: You familiarized yourself with that affidavit since that date?
A: Yes.
Q: It's very limited to an incident on June 13th into the 14th of 2015, right.
A: Sure.
Q: all the videos that you've talked about in regard to the subject of this case, they all have the same Exif, E-X-I-F, time, correct? You said that doesn't change

A: No, it doesn't change.
Q: And the Exif times for all those videos all show almost a year prior to what's in the affidavit, am I correct?
A: Yes.
Q: What then caused you to look at something that you knew was one year prior to an allegation that was in Agent Kallestad's affidavit?
A: Nothing told me I could not look at the entire contents of the phone.

Investigator Smith was uniquely aware that there is a limit to his search of the cell phone in terms of the scope of the search. He was uniquely aware that if there was something that was not within the scope of the search that he would have to stop the search and seek a new warrant. The following colloquy occurred on the record at the hearing between defense counsel and Mr. Smith:

(H156)
Q: By the way, you had said to Judge Kahn that if you found something that was outside the scope of the investigation you would stop. Those are your words, right?
A: Yes.
Q: You would stop, you would contact the agent, and you would have the agent generate another affidavit, correct?
A: Correct. And largely that's for like child pornography.
Q: Correct me if I wrong, in any situation if there was something that you found that was outside the scope of the investigation, you would stop right?
A: Yes.
Q: Because that would not be permissible, correct.
A: That crime that I identify may not be if I don't identify it to the case agent.
Q: For you to get another affidavit means permission to look at what you may want to look at, right?
A: Yes. But that's nothing that I do. I strictly stop, contact the case agent, and wait.

The computer and software that Investigator Smith used was capable of limiting the search of the contents of Dylan's cell phone by date, time, and file type; however, Smith did not limit his search in any way.

(H154-155)

Q: When you say you can do searches, so we're clear, on this initial Lantern forensic report, now that it's on your computer you can do keyword searches to get certain things?
A: Correct.
Q: Can you also search by dates, dates when things are created?
A: Within Lantern I can, yes.
Q: You can. So you could, before you went any further – and when you say Lantern, I assume you're saying not from the initial download, but once you have this report?
A: Once I have the dump completed and I'm in Lantern, yes.
Q: You then can put in a specific date? In other words, you can say May 10, 2016 forward if you wanted to.
A: Yes.
Q: You can do parameters, correct?
A: Yes.
Q: The incident that you're investigating you know was June 13, 2015, correct?
A: Yes.
Q: So you could have put as a parameter June 13, 2015, for everything, for the text, for the photos, for the videos, for everything June 13, 2015, to the present, whatever date you are doing it, correct?
A: Correct.
Q: And why didn't you do that?
A: There was no reason for me to limit the search.

The EXIF Time Stamp On The Videos Showed That The Videos Searched Were From A Year Prior To The Investigation Authorized By The CASS And The PASS

Investigator Smith knew the video files that he opened and viewed were from the year prior and had nothing to do with this investigation. Each of the videos that he opened was time stamped as to the date of its creation and the PDF version of the videos had them clearly marked with an EXIF stamp that showed the videos were made in June of 2014, a year prior to the Florida incident that was being investigated pursuant to the CASS and the PASS. (H151-152)

Investigator Smith exceeded the scope of the CASS and the PASS and the search was overbroad because he did not have authorization to search prior to June 13, 2015 and he did not have authorization to search anything other than text messages.

The Trial Court Erred When It Found That The Consent Was Valid And Voluntary: Dylan Flynn Was Confronted With An Order From The Captain To Relinquish His Cell Phone And As A Navy SEAL He Followed Orders

After a hearing, the trial found that the consent form (the PASS) signed by Dylan was a valid consent and the phone and its contents were, therefore, admissible and not subject to suppression under the Fourth Amendment or Article 1 Section 12 of the New York State Constitution. The trial court erred in its analysis as the consent was not voluntarily given. Dylan was confronted with an

order from the Captain, commander of the base, that he relinquish his phone. As a Navy SEAL and low-ranking member of the military, Dylan was trained and taught to obey orders. The Captain issued an order – Dylan Flynn obeyed the order. Dylan's signing of the PASS form was not a voluntary act; it was acquiescence to a lawful authority; it was acquiescence to the orders of the Captain, the highest ranking member on the base to which Dylan was assigned. Additionally, at the time that Dylan was asked to sign the consent form, the phone was no longer in his possession, and he had no control over it. The signing of the consent form was not a voluntary act regarding an object over which he had control. The trial court erred when it found that PASS document was valid and that the search of the phone was legal and admissible.

Consent To Search Must Be Voluntarily Given In Order To Be Valid

A prosecutor has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. *Bumpers v. North Carolina*, 391 U.S. 543, 548-49 (1968); *People v. Marcial*, 109 A.D.2d 937, 938 (2d Dept. 2013). When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search.

The situation is instinct with coercion – albeit colorably lawful coercion. Where there is coercion there cannot be consent. *Bumpers v. North Carolina*, 391 U.S. at 550; *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979).

Consent to search is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle. *People v. Gonzalez*, 39 N.Y.2d 122, 128 (1976). No one circumstance is determinative of the voluntariness of consent. Whether consent has been voluntarily given or is only a yielding to overbearing official pressure must be determined from the circumstances. *People v. Gonzalez*, 39 N.Y.2d at 128.

New York Courts, consistent with *Bumpers v. North Carolina*, have continuously held that consent to search is not voluntary where the person consenting is subject to a claim of lawful authority and merely acquiesces. Where the circumstances objectively reveal overbearing official conduct in obtaining an apparent consent that consent is not voluntary. *People v. Gonzalez*, 39 N.Y.2d 122, 124 (1976); *People v. Marcial*, 109 A.D.3d 937 (2d Dept. 2013); *People v. Weissman*, 46 Misc.3d 171, 181 (Sup. Ct. Kings Cty. 2014).

Factors In Determining Whether Consent To Search Is Voluntary

Both the U.S. Supreme Court and the New York Court of Appeals have outlined various factors to take into consideration when determining whether a consent to search was voluntary.

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) the Supreme Court held that the totality of the circumstances should be weighed in determining whether a consent was voluntary and cited the following factors: 1) knowledge of the constitutional right to refuse to consent; 2) age, intelligence, education, and language ability; 3) the degree to which the individual cooperates with police; 4) the individual's attitude about the likelihood of the discovery of contraband; and 5) the length of detention and the nature of the questioning, including the use of physical punishment or other coercive police behavior. *Schneckloth,* 412 U.S. at 226.

Following the Supreme Court's lead, the New York Court of Appeals issued its decision in *People v. Gonzalez*, 39 N.Y.2d 122 (1976) outlining factors to consider in determining whether a consent to a search is voluntarily given: 1) an important, although not dispositive factor of an apparent consent is whether the consenter is in custody; 2) the background of the consenter. One who has limited

contact with the police makes consent more likely to be constrained and not voluntary; 3) whether the consenter has been cooperative with law enforcement authorities; and 4) whether the consenter was advised of his right to refuse to consent and where this advice is contained in a form that consenter signs, it may not ameliorate the coercive atmosphere. *People v. Gonzalez*, 39 N.Y.2d at 128-130.

Most importantly, and in addition to these factors, it should be noted that New York Courts have consistently held that where the consenter was faced with an order or claim of lawful authority, the consent was not voluntary. *People v. Matta*, 76 A.D.2d 844 (2d Dept. 1980); *People v. Marcial*, 109 A..3d 937 (2d Dept. 2013); *People v. Weissman*, 46 Misc.3d 171 (Crim. Ct. Kings Cty. 2014).

Dylan Flynn Followed The Captain's Orders.

In this case, Dylan Flynn was a member of the military and a Navy SEAL, member of Team 8. His rank as an enlisted member was an E5 Petty Officer. When Agent Kallestad of the NCIS first spoke with Dylan, Kallestad informed him that Captain McAlearney, the installation commander of the base, had issued an order authorizing a search and seizure of Dylan's cell phone. (H45, 46, 48, 77, 78,

86) From the perspective of Dylan Flynn, the Captain, and highest-ranking member of the base on which he was stationed, had issued an order. Dylan Flynn, as a low ranking member of the military had no choice but to follow that order. He relinquished his phone because the Captain had ordered him to do so.

This case is analogous to *Bumpers v. North Carolina* and *People v. Gonzalez* and *People v. Marcial* and *People v. Weissman*. In each of those cases, the consent to search was found to be an acquiescence to a lawful authority and not voluntary. In *Bumpers*, an elderly woman was told that a search warrant existed to search her home, just as Dylan was told that a search authorization existed to search his phone. The elderly woman acquiesced in *Bumpers* because she believed that she had no choice. That is precisely what happened to Dylan Flynn in this case. The NCIS agent informed Dylan that he had an order from the Captain regarding Dylan's phone. He merely followed the Captain's order because that is what a member of the military does, he follows orders, especially the Captain's order.

The fact that the Captain had ordered the search and seizure of the phone and that Dylan Flynn was informed of the Captain's order were before the trial court at the pretrial hearing (H45, 46, 48, 77, 78, 86). The trial court was able to consider the issue of voluntariness of the consent in its decision dated July 15,

2016. When Dylan signed the PASS order, it was not a voluntary act, it was not a true act of the will, it was not a product of an essentially free and unconstrained choice.

The Search Of The Cell Phone Exceeded The Scope Of The Permissive Authorization For Search And Seizure Of The Cell Phone And The Trial Court Erred In Its Analysis Of The Permission Granted And Its Scope.

The search conducted by the NCIS Agent and Investigator Smith was beyond the scope authorized by the PASS document signed by Dylan Flynn because that document limited the search to the investigation concerning the alleged sexual assault that occurred in Florida in June of 2015. The permitted search was limited by Dylan Flynn in both time and subject matter.

The standard for measuring the scope of a suspect's consent to search under Fourth Amendment is that of "objective" reasonableness, i.e., what would a typical reasonable person have understood by the exchange between officer and suspect. *Florida v. Jimeno*, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991). The scope of a search is generally defined by its expressed object. *Jimeno,* 500 U.S. at 251 holding that a general consent to search, on its own, does not give an officer unfettered search authority.

In determining the scope of consent, a suppression court must look to the exchange between the parties—both the request and the response—and any attendant circumstances to determine whether a suspect was reasonably put on notice that the search would likely cause damage. Once a search exceeds the objectively reasonable scope of a voluntary consent, a more specific request or grant of permission is needed. *People v. Gomez*, 5 N.Y.3d 416, 419–20, 838 N.E.2d 1271, 1273–74 (2005).

In this case, the NCIS agent had interviewed Dylan Flynn and made him aware of the subject matter of the inquiry: an investigation of a sexual assault that occurred in June 2015, a few days prior to Kallestad's interview with Flynn. Flynn was then notified that the captain of his base, the highest-ranking officer, issued an order that he relinquish his phone. The exchange between Flynn and Kallestad led Flynn to believe that they would search his phone only for text messages that were exchanged within the past few days.

Additionally, Kallestad's false promises to Flynn to get his phone back more quickly if he signed the PASS should be considered by this Court. Kallestad clearly misrepresented the fact to Dylan because signing the PASS would never have gotten the phone back to Dylan any sooner, especially in light of the fact that

the search authorization had already been signed by the Captain. This was false information and false inducement to sign the PASS form to consent to the search. In light of the Captain's order and the conversations that Dylan had with the NCIS agent, it was clear that Dylan understood that they were going to search his phone for the text messages that he exchanged with Tara Kennedy within the past few days. It was clear because that was the context of the request for the PASS, because that was the context of Dylan's conversation with Kallestad, and because that was the object of the investigation.