SC20-1419

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOHNATHAN DAVID GARCIA,

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE
FIFTH DISTRICT COURT OF APPEAL
CASE NO. 5D19-590

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STATEMENT OF THE CASE AND FACTS

Respondent Johnathan Garcia was arrested and charged with throwing a deadly missile at, within, or into a building; two counts of aggravated stalking with a credible threat; and two counts of criminal mischief. App'x 4. The State obtained a warrant to search Garcia's smartphone for information related to the aggravated stalking with credible threat charges, but accessing the phone required a passcode. App'x 5. Relying on *State v. Stahl*, 206 So. 3d 124 (Fla. 2d DCA 2016), the trial court granted the State's motion to compel disclosure of that passcode. App'x 5-6.

Garcia then petitioned the Fifth District for a writ of certiorari; the court granted the petition and quashed the trial court's order. App'x 13 (Lambert, Harris, and Grosshans, J.J.). In so doing, the court held that, under the Fifth Amendment, the compelled disclosure of Garcia's passcode would be testimonial in nature and that the foregone-conclusion exception did not apply. App'x 9, 12. The court then "certif[ied] conflict with the Second District Court's decision in *Stahl* to the extent that *Stahl* holds that the oral disclosure of a passcode to a passcode-protected cell phone or smartphone is non-testimonial and therefore not protected under the Fifth Amendment." App'x 13. It also certified the following questions to this Court as being of great public importance:

1. MAY A DEFENDANT BE COMPELLED TO DISCLOSE ORALLY THE MEMORIZED PASSCODE TO HIS OR HER SMARTPHONE OVER THE INVOCATION OF PRIVILEGE UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. IF ORALLY PROVIDING THE PASSCODE TO A PASSCODE-PROTECTED SMARTPHONE IS A "TESTIMONIAL COMMUNICATION" PROTECTED UNDER THE FIFTH AMENDMENT, CAN THE DISCLOSURE OF THE PASSCODE NEVERTHELESS BE COMPELLED UNDER THE FOREGONE CONCLUSION EXCEPTION OR DOCTRINE WHEN THERE IS NO DISPUTE THAT THE DEFENDANT IS THE OWNER OF THE PASSCODE-PROTECTED PHONE?

App'x 13. In a decision issued on the same day, a different panel of the Fifth District also certified conflict and certified the same two questions of great public importance. *Hager v. State*, No. 5D20-1426, --- So. 3d ---, 2020 WL 5088061, at *1 (Fla. 5th DCA Aug. 28, 2020) (Cohen, Eisnaugle, and Sasso, J.J.).[1] The First District has also certified two similar questions of great public importance. *Pollard v. State*, 287 So. 3d 649, 663 (Fla. 1st DCA 2019), *petition voluntarily dismissed*, No. 20-110 (Fla. 2020).[2]

[1] The State is seeking this Court's review in *Hager* as well. *See State v. Hager*, SC20-1421 (Fla.).

[2] The First District certified the following questions:

WHAT IS THE PROPER LEGAL INQUIRY WHEN THE STATE SEEKS TO COMPEL A SUSPECT TO PROVIDE A PASSWORD TO THE SUSPECT'S CELLPHONE IF THE SUSPECT HAS NOT PREVIOUSLY GIVEN UP HIS FIFTH AMENDMENT PRIVILEGE

The State now seeks this Court's review of the conflict issues and of the issues of great public importance certified by the Fifth District. In accordance with Fla. R. App. P. 9.120(d), this brief is limited to conflict jurisdiction.

SUMMARY OF ARGUMENT

This Court should exercise its discretionary jurisdiction to resolve the certified conflict recognized in the Fifth District's decision. Like the First District in *Pollard v. State*, 287 So. 3d 649 (Fla. 1st DCA 2019), the Fifth District concluded that a compelled passcode is testimonial under the Fifth Amendment, while the Second District reached the opposite conclusion in *Stahl*; the Fifth District therefore appropriately certified conflict.

What is more, the Fifth District would have denied the writ of certiorari, rather than quashed the trial court's order—whether or not a compelled passcode is testimonial—had it applied *Stahl*'s foregone conclusion analysis. All of the facts material to the *Stahl* court's analysis were present here: the State demonstrated that Garcia's phone had a passcode, that he knew it, and that the passcode would be self-authenticating. The *Stahl* court would not have quashed the trial court's order in this

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IN THE PASSWORD? WHAT LEGAL STANDARD APPLIES IN DETERMINING WHETHER THE FOREGONE CONCLUSION [EXCEPTION] APPLIES TO COMPELLED PRODUCTION OF PASSWORDS IN THESE SITUATIONS?

case unless Garcia disputed either that the phone was his or that he knew the passcode—but he doesn't dispute either fact. *Stahl* is thus indistinguishable on its material facts but different in result, and so the case below also expressly and directly conflicts with *Stahl*.

Prompt resolution of these conflicts is warranted. Whether a defendant can be compelled to disclose his cell phone passcode should not depend on the District in which he is being prosecuted. Moreover, in light of the increasing amount of evidence located on cell phones, providing guidance to law-enforcement authorities regarding the showing necessary to access that information is critically important.

ARGUMENT

To begin with, some common ground exists between the decision below and *Stahl*. In both cases, the State sought to compel a defendant to disclose the passcode to a smartphone, the contents of which the State had a warrant to search. App'x 5; *Stahl*, 206 So. 3d at 128. In both cases, the State established that the defendant owned the phone. App'x 5; *Stahl*, 206 So. 3d at 128. And in both cases, it was undisputed that the defendant knew the passcode to unlock the phone. App'x 5; *Stahl*, 206 So. 3d at 136. But that is where the common ground ends.

As the Fifth District correctly certified, the decision below directly conflicts with *Stahl*. *First*, the Fifth District concluded that a compelled passcode disclosure

is testimonial in nature, while *Stahl* found the opposite, and the Fifth District certified conflict on that issue. App'x 13; *Stahl*, 206 So. 3d at 135; *see* Art. V, s. 3(b)(4), Fla. Const. *Second*, the Fifth District's analysis of the foregone-conclusion exception differed from *Stahl*'s in an outcome-determinative fashion. App'x 9-12; *Stahl*, 206 So. 3d at 135-36; *see* Art. V, s. 3(b)(3), Fla. Const. This Court should resolve both conflicts.

I. THE DECISION BELOW SPLIT FROM THE SECOND DISTRICT ON WHETHER A COMPELLED PASSCODE IS A TESTIMONIAL COMMUNICATION.

The *Stahl* court concluded that a compelled passcode was not testimonial for purposes of the Fifth Amendment because it "was sought only for its content and the content has no other value or significance." *Stahl*, 206 So. 3d at 134. By revealing the passcode, the Second District explained, the defendant would not be admitting, for example, that the phone contained incriminating evidence. *Id.* Instead, the compelled disclosure would constitute only a "'nonfactual statement that facilitates the production of evidence' for which the State has otherwise obtained a warrant based upon evidence independent of the accused's statements linking the accused to the crime." *Id.* (quoting *Doe v. United States*, 487 U.S. 201, 213 n.11 (1988)).

Here, the Fifth District disagreed, holding that "the compelled disclosure of [Garcia's] passcode is testimonial and is protected by the Fifth Amendment." App'x

9. The Fifth District therefore correctly certified conflict with *Stahl*, and this Court should resolve this important and recurring conflict.

II. THE DECISION BELOW ALSO SPLIT FROM THE SECOND DISTRICT ON THE PROPER APPLICATION OF THE FOREGONE-CONCLUSION EXCEPTION.

The decision below also expressly and directly conflicts with *Stahl* because the Fifth District rejected the *Stahl* court's mode of analysis regarding the foregone-conclusion exception.

Even if a compelled production would otherwise be testimonial and thereby implicate the Fifth Amendment, the foregone-conclusion exception provides that if the State establishes through independent means the existence, possession, and authenticity of the testimonial information sought to be compelled, the compelled production is a foregone conclusion that eliminates the testimonial value of the information. *See Fisher v. United States*, 425 U.S. 391, 411 (1976). In other words, if the State shows that it already knows that (1) the information exists, (2) the defendant possesses it, and (3) the information is authentic, then the defendant's compelled disclosure adds nothing and, accordingly, the "question is not of testimony but of surrender." *Id.* (quoting *In re Harris*, 221 U.S. 274, 279 (1911)).

In *Stahl*, the Second District explained that, "[t]o know whether providing the passcode implies testimony that is a foregone conclusion, the relevant question is whether the State has established that it knows with reasonable particularity that the

passcode exists, is within the accused's possession or control, and is authentic." 206 So. 3d at 136. The court's analysis "focused on disclosure of the password itself, rather than the information that access to the cellphone would produce." *Pollard*, 287 So. 3d at 654 (discussing *Stahl*).

The *Stahl* court went on to hold that the exception applied there because the State had established (1) "that the phone could not be searched without entry of a passcode," meaning that "[a] passcode therefore must exist"; (2) "that the phone was Stahl's and therefore the passcode would be in Stahl's possession"; and (3) that the passcode was "self-authenticating"—"[i]f the phone . . . is accessible once the passcode . . . has been entered, the passcode . . . is authentic." 206 So. 3d at 136. Accordingly, Stahl would not be admitting potentially incriminating information that the State did not already possess. Thus, the Second District concluded that Stahl's disclosure of the passcode would itself have no testimonial value and disclosure of it would not run afoul of the Fifth Amendment.

The Fifth District's analysis of the foregone-conclusion exception differed dramatically from the *Stahl* court's analysis. The Fifth District concluded that "it would be imprudent to extend the foregone-conclusion exception beyond its application as described in *Fisher*." App'x 12. While the *Stahl* court required that—to meet the foregone-conclusion exception—the State must establish the defendant's

ownership of the phone, knowledge of the passcode, and the passcode's self-authentication, the Fifth District rejected that approach. The court explained that "other than in those limited circumstances when a defendant's ownership of the smartphone was in question, it would necessarily be a 'foregone conclusion' that a defendant, as the owner of the passcode-protected phone, would have knowledge of or have otherwise memorized his or her passcode." App'x 12. In the court's view, then, "[t]o summarily compel the oral production of the passcode from a defendant in such circumstances would contravene the protections afforded under the Fifth Amendment." App'x 12. This approach, which precludes an order requiring a defendant to disclose the passcode even when the State has a lawfully obtained warrant for the contents of a phone which the State knows the defendant owns and knows the passcode for, expressly and directly conflicts with the Second District's approach.

* * *

Resolving these conflicts promptly is warranted. Given the increasing frequency with which potentially incriminating information is located on

defendants' cell phones, this Court's review is needed to ensure uniformity and provide guidance to lower courts, law enforcement, and suspects in criminal cases.[3]

CONCLUSION

Petitioner respectfully requests that this Court accept jurisdiction.

Respectfully submitted.

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[3] Should this Court grant review, it may also wish to consider whether the Fifth District had jurisdiction to issue a writ of certiorari. *See*, *e.g.*, *Tillman v. State*, 471 So. 2d 32, 34 (Fla. 1985) ("Once the case has been accepted for review here, this Court may review any issue arising in the case that has been properly preserved and properly presented."); *Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983) (discussing requirements for a writ of certiorari).

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished via the E-Filing Portal on this 14th day of October, 2020, on all parties required to be served.

/s/ *Christopher J. Baum*
Christopher J. Baum (FBN 1007882)

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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