

IN THE SUPREME COURT OF FLORIDA

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CASE No.: SC20-1419

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STATE OF FLORIDA,

*Petitioner,*

v.

JOHNATHAN DAVID GARCIA,

*Respondent.*

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ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE FIFTH DISTRICT  
COURT OF APPEAL  
LOWER CASE No.: 5D19-0590

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RESPONDENT'S ANSWER BRIEF ON JURISDICTION

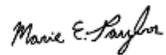
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## **STATEMENT OF THE CASE AND FACTS**

The Fifth District Court of Appeal expressly stated it was “hold[ing] that compelling a defendant, such as Garcia, to provide orally the passcode to his smartphone is a testimonial communication protected under the Fifth Amendment and that the foregone conclusion exception or doctrine does not apply to compelled oral testimony.” App’x to IB at 12. Because of the direct contrast between this ruling and the Second District Court of Appeal’s ruling in *State v. Stahl*, 206 So. 3d 124 (Fla. 2d DCA 2016), the Fifth District “certif[ied] conflict with the Second District 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 to IB at 13.

The other relevant facts prompting the trial court’s order compelling Garcia to provide his passcode to the State were aptly summarized by the Fifth District in its order granting Garcia’s petition for writ of certiorari and quashing the trial court’s order. App’x to IB at 4–6. Petitioner’s own “Statement of the Case and Facts” accurately recites the facts. IB at 1–3. But Petitioner embellishes the historical facts on record here in its “Summary of Argument” and “Argument” sections of the Initial Jurisdictional Brief. Namely, Petitioner claims “the State demonstrated that Garcia’s phone had a passcode, that he knew it, and that the passcode would be self-authenticating.” IB at 3. These conclusions are utterly devoid from the Fifth

District’s factual recitation in the “Background” section of its order. App’x to IB at 4–6. This is for good reason—the hearing on the State’s motion to compel Garcia to provide the passcode to the phone in police custody lasted but a few minutes, the trial court heard only brief arguments from each side, and neither party presented any evidence. Most of these purported “facts” have yet to be established.

The pertinent facts to invoke the Court’s discretionary jurisdiction are that: the question of whether Garcia must provide his passcode to the State is still ripe; the State still seeks the passcode from Garcia; Garcia still asserts his Fifth Amendment right not to comment on whether he knows or can provide the passcode; and the Fifth District certified that it and the Second District rendered directly contradictory rulings on whether compelled passcodes are testimonial communications protected by the Fifth Amendment. App’x to IB at 13.

### **STATEMENT OF THE ISSUES**

The questions certified by the Fifth District Court as being of great public importance, but not addressed in the arguments below, are:

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 to IB at 13. Additionally, and relevant to this Brief, the Fifth District specifically certified the following issue as one that led the Fifth District to a ruling in direct conflict with the Second District's ruling on the same issue in *Stahl*: whether "the oral disclosure of a passcode to a passcode-protected cell phone or smart phone is non-testimonial and therefore not protected under the Fifth Amendment." App'x to IB at 13.

**SUMMARY OF THE ARGUMENT**

Respondent agrees that the Court should review the issue presented causing express and direct conflict between the Fifth District and the Second District Court of Appeal. Respondent concurs with Petitioner that this conflict is also present between the First District's ruling in *Pollard v. State*, 287 So. 3d 649 (Fla. 1st DCA 2019), where the First District concluded, in conflict with the Second District's holding in *Stahl* but consistent with the Fifth District's ruling below, that a compelled phone passcode is a testimonial communication. Additionally, in *G.A.Q.L. v. State*, 270 So. 3d 1058 (Fla. 4th DCA 2018), the Fourth District also

held a compelled passcode is a testimonial communication, putting it, too, in conflict with the Second District.

But Respondent disagrees both with Petitioner's assertion that the Court has discretionary conflict jurisdiction to review the Fifth District's analysis of the foregone conclusion exception and with Petitioner's contention that "the Fifth District would have denied [Respondent's] writ of certiorari [. . .] had it applied *Stahl's* foregone conclusion analysis." IB at 3. The Fifth District's holding regarding the application of the foregone conclusion exception was not certified as a source of direct interdistrict conflict under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and Article V, § 3(b)(3) of the Florida Constitution. That issue was only certified as a question of great public importance.

## **ARGUMENT**

### **I. THE FIFTH DISTRICT COURT'S RULING CONFLICTS WITH THE SECOND DISTRICT COURT'S RULING ON THE SAME QUESTION OF LAW**

Respondent concedes there is an express and direct conflict between the Fifth District's holding below and the Second District's holding in *State v. Stahl*, 206 So. 3d 124 (Fla. 2d DCA 2016), as certified by the Fifth District. However, that certification, and therein the express conflict, is limited to whether a compelled passcode to a phone is a testimonial communication. The Second District ruled it was not in *Stahl*. Since then, the Fourth District ruled that it is a testimonial communication in *G.A.Q.L. v. State*, 270 So. 3d 1058 (Fla. 4th DCA 2018), the First

District ruled that it is a testimonial communication in *Pollard v. State*, 287 So. 3d 649 (Fla. 1st DCA 2019), and now the Fifth District has ruled it is a testimonial communication in this case and in *Hager v. State*, No. 5D20-1426, 2020 WL 5088061 (Fla. 5th DCA Aug. 28, 2020).

Petitioner's summary of the Second District's ruling is accurate. IB at 5, 6–7. Petitioner also accurately summarized the Fifth District's opinion causing the conflict between the two courts on whether a compelled passcode is testimonial. IB at 5–6, 7–8. Rather than repeatedly summarizing both opinions, Respondent only writes here to emphasize that the conflict does not stop with the Second and Fifth District Courts. The First and Fourth District Courts have also issued rulings in *Pollard* and *G.A.Q.L.* respectively, that concur with the Fifth District Court, finding that a compelled passcode is a testimonial communication. By the same token, these rulings, too, directly conflict with the Second District. While Petitioner and Respondent are both addressing only the conflict between the Fifth District's ruling here and the Second District's ruling in *Stahl*, Respondent believes it is worth emphasizing how the conflict has expanded throughout Florida.

Cell phones are ubiquitous to modern life. It is common knowledge that most cell phones contain some amount of private information, so manufacturers encrypt these devices and direct users to create passcodes to prevent others from accessing their data. Whenever a phone is a potential source of evidence, law enforcement will

likely need some way to get past a passcode. As it stands now, a defendant's Fifth Amendment right protecting the defendant from being compelled to provide a passcode is not based on the particular circumstances and strength of the State's case. Rather, it will largely depend on where the case happens. Geography should not determine what fundamental rights a Floridian has. Respondent believes it is prudent for this Court to address the question of law causing interdistrict conflict as certified by the Fifth District Court.

## **II. THERE IS NO EXPRESS, DIRECT INTERDISTRICT CONFLICT ON THE QUESTIONS OF WHETHER OR HOW THE FOREGONE CONCLUSION EXCEPTION COULD APPLY TO COMPELLED PASSCODES**

### **A. THE FIFTH DISTRICT DID NOT CERTIFY WHETHER AND HOW TO APPLY THE FOREGONE CONCLUSION EXCEPTION AS A SOURCE OF DIRECT INTERDISTRICT CONFLICT**

The Florida Constitution grants the Florida Supreme Court its discretionary jurisdiction based on interdistrict conflict in Article V, § 3(b)(3). It provides that the Court “[m]ay review any decision of a district court of appeal [. . .] that **expressly and directly** conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.” *Id.* (emphasis added). As the Court noted in its ruling in *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980), this represented a change to the wording of the Court's discretionary jurisdiction prior to 1980 by adding a specific requirement for interdistrict conflicts to be **explicitly** stated in a district court's opinion. *Id.*

The Fifth District Court expressly certified that its ruling on whether a compelled passcode is a testimonial communication conflicts with the Second District Court's ruling in *Stahl*. Even so, while the Fifth District went on to certify the question of whether and how the foregone conclusion exception applies to compelled passcodes as a question of great public importance, this question of law was specifically omitted from the court's certification of interdistrict conflict. App'x to IB at 13. This Court should not find it has discretionary jurisdiction to address that question of law unless it exercises its discretionary jurisdiction to address it as a question of great public importance.

**B. THERE IS NOT A DIRECT CONFLICT BETWEEN THE FIFTH AND SECOND DISTRICT'S RULINGS REGARDING THE FOREGONE CONCLUSION EXCEPTION**

Even if the Fifth District Court had not narrowly tailored its certification of interdistrict conflict exclusively to whether compelled passcodes are testimonial communications, the Fifth District's ruling on whether the foregone conclusion exception applies to compelled passcodes does not **directly** conflict with the Second District's ruling in *Stahl*. The Second District was presented with the same two questions of law in *Stahl* that the Fifth District certified to be questions of great public importance in this case: (1) whether compelled passcodes constitute testimonial communications; and **if they do** (2) whether the foregone conclusion

exception can be applied to compelled passcodes. App’x to IB at 13. The second question of law only needs to be addressed if the answer to the first is yes.

But the Second District’s answer to the first question of law was no. *Stahl*, 206 So. 3d at 136–37. Therefore, the Second District’s discussion of how the trial court applied the foregone conclusion exception is obiter dicta. While the Second District Court addressed how it believed the trial court departed from the essential requirements of the law by misapplying the foregone conclusion exception, it did not need to address that question of law. Once the Second District decided the trial court departed from the essential requirements of the law by allowing Stahl to invoke the Fifth Amendment privilege against self-incrimination to prevent the compelled production of his phone passcode, the Second District reached the conclusion necessary to issue its writ of certiorari and quash the trial court’s order.

The Court should not exercise its discretionary conflict jurisdiction to address purported conflicts between one district court’s ruling on the merits and another district court’s comments noted merely in dicta. *Ciongoli v. State*, 337 So. 2d 780 (Fla. 1976) (“After hearing oral argument, we have concluded that the conflicting language is mere Obiter dicta, and that the writ of certiorari should be discharged.”); *see also Newton v. Caterpillar Financial Services Corporation*, 253 So. 3d 1054 (Fla. 2018) (*Lawson, J.*, dissenting) (“To meet [the conflict jurisdiction standard], the cases alleged to be in conflict must decide—meaning reach a holding on—the

same question of law.” (citations omitted)); *Patrick v. Hess*, 212 So. 3d 1039 (Fla. 2017) (*Canady, J.*, dissenting) (“In dicta, *Haigh* commented that under FEFJA, ‘proceedings to enforce a foreign judgment are derivative of the original judgment and are therefore subject to the limitations period in the jurisdiction where the judgment was originally rendered.’ Such comments do not establish binding legal precedent and therefore do not create conflict.” (citations omitted)); *Gutierrez v. State*, 177 So. 3d 226 (Fla. 2015) (*Canady, J.*, dissenting) (“The court’s statements to this effect are dicta, i.e., comments not necessary to the decision. Such comments do not establish binding legal precedent and therefore do not create conflict.”).

Once it decided a compelled passcode is not a testimonial communication protected by the Fifth Amendment, the Second District Court did not need to reach the question of how the foregone conclusion exception should apply to compelled passcodes. That portion of the *Stahl* opinion is dicta, so it “do[es] not establish binding legal precedent and therefore do[es] not create conflict.” *Patrick*, 212 So. 3d at 1045 (*Canady, J.*, dissenting); *Gutierrez*, 177 So. 3d at 234 (*Canady, J.*, dissenting). Respondent suspects this is why the Fifth District’s certification of conflict stops with whether the compelled passcode is testimonial, and Respondent argues this Court does not have discretionary conflict jurisdiction to address the question of whether and how the foregone conclusion exception applies to compelled passcodes.

## CONCLUSION

Respondent agrees that the Court should accept discretionary conflict jurisdiction to address the certified question of whether a compelled phone passcode is testimonial. However, the Court does not have conflict jurisdiction to address the issue of whether and how the foregone conclusion exception applies to compelled passcodes because there is not an express, direct conflict between the Fifth and Second District Courts on this question of law.

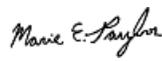
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service/e-mail/e-portal delivery to the Office of the State Attorney, PCF@sao9.org; the Office of the Attorney General, christopher.baum@myfloridalegal.com; and by mail delivery to the Honorable Judge Gail Adams, at the Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801 on this the 13th day of November, 2020.

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing brief, submitted in 14-point Times New Roman, complies with the font standards of Florida Rule of Appellate Procedure 9.210.

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