IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC20-1419

STATE OF FLORIDA,

Petitioner,

v.

JOHNATHAN DAVID GARCIA,

Respondent.

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

ANSWER BRIEF ON THE MERITS

ROBERT WESLEY, B.C.S.
Public Defender

ROBERT THOMPSON ADAMS IV
Florida Bar No. 107152
Assistant Public Defender

CATHERINE CONLON, B.C.S.
Florida Bar No. 663271
Assistant Public Defender

DAVID L. REDFEARN, B.C.S.
Florida Bar No. 21228
Assistant Public Defender

MARIE TAYLOR
Florida Bar No. 1003697
Assistant Public Defender

Office of the Public Defender
435 N. Orange Ave., Suite 400
Orlando, FL 32801
407-270-0402
radams@circuit9.org
cconlon@circuit9.org
dredfearn@circuit9.org
mtaylor@circuit9.org

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF THE ISSUES

The Fifth District Court of Appeal certified two issues for which this Court accepted jurisdiction to review based on interdistrict conflicts and questions of great public importance. *Garcia v. State*, 302 So. 3d 1051, 1057 (Fla. 5th DCA 2020). Those issues are:

I. Whether a defendant can be compelled to disclose orally the memorized passcode to a smartphone over the invocation of the right against self-incrimination under the Fifth Amendment to the United States Constitution; and

II. If disclosure of the passcode is a testimonial communication protected by the Fifth Amendment, whether it can still be compelled under the foregone conclusion exception.

The State's[1] Initial Brief raises a third about the Fifth District's jurisdiction to issue a writ of certiorari. So, Garcia also addresses the third issue:

III. Whether this Court should review the unpreserved issue of whether the district court had certiorari jurisdiction to quash the trial court's order.

[1] We call Petitioner the "State" and Respondent "Garcia."

STATEMENT OF THE CASE AND FACTS

This case is about which vision of the right against compelled self-incrimination prevails: those of the Founders who erred on the side of personal liberty or those who defend governmental powers to extract testimony. *Pollard v. State*, 287 So. 3d 649, 664 (Fla. 4th DCA 2019). "The expansion of governmental powers to compel disclosures of personally-held information to search person's [sic] homes and personal effects . . . is the antipode of the original understanding of the Fifth Amendment, which protected individual freedom by prohibiting compelled disclosures used to incriminate an accused." *Id.* (citations omitted). The State advocates gutting the Fifth Amendment for the sake of convenience. Compelling defendants to tell the government their passcodes is a convenient way for the State to claw into the endless stores of personal information on a person's smartphone. This unchecked power to sift through an unlimited digital record of the intricate details of a person's life encourages the government to cast a wide net for its agents to fish for evidence of wrongdoing.

In March 2018, police responded to a house with a broken window. Anna Diaz told officers she was in bed with her boyfriend,

Terrell Collins, when she heard a bang and found the bedroom window shattered. Neither Diaz nor Collins saw who did it, but Diaz told police she thought the car she heard driving away sounded like her ex-boyfriend's, Johnathan Garcia. Pet. App'x 3–4. But Diaz also told police she did not think Garcia knew where Collins lived. Pet. App'x 4. Police found a smartphone on the ground outside, near the bedroom window. Diaz claimed it belonged to Garcia and, according to a police report, when she called the number she claimed was Garcia's, the recovered smartphone rang and displayed Diaz's name and number. Weeks later, police obtained an arrest warrant and arrested Garcia for aggravated stalking. Pet. App'x 3–8.

About a year later, police applied for and obtained a search warrant to download and search the entire contents of the recovered smartphone, a Samsung Galaxy Note 8. The application notes that sometime after Garcia's arrest, the alleged victim claimed she found a GPS tracker in her vehicle, which police assert can be used with a smartphone or computer. The warrant concludes that there is "proble [sic] cause to believe the black Samsung Galaxy Note8 [sic] [. . .] contains storage of evidentuary [sic] data pertaining to Aggravated Stalking with Crediable [sic] Threat[.]" Pet. App'x 10. The warrant's

scope is broad. It permits a data dump and search of all data from the smartphone's "central processing units, internal and peripheral storage, memory storage devices or media such as optical disks, or any other storage where data can be stored, together with indicia of use, ownership, possession, or control of such data," to find evidence "in the form of contact/phone lists, call logs, SMS (simple Message Service, a/k/a text) messages, MMS, and/or graphic or video files and/or any other relevant data which are stored within the phone device." Pet. App'x 10–12. The warrant includes no specific description of the particular information police sought from the smartphone. *See* Pet. App'x 10–12.

In January 2019, the State filed an Amended Information charging Garcia with five counts: throwing missile at, within, or into a building, a second-degree felony; two counts of aggravated stalking with a credible threat, a third-degree felony; criminal mischief ($200 or more), a first-degree misdemeanor; and criminal mischief, a second-degree misdemeanor. Cumulatively, he faces up to 26 years and 60 days imprisonment. As the case moved to trial, the State apparently thought it needed access to the phone's contents to prove beyond a reasonable doubt the smartphone was Garcia's and that he

possessed it on the night Collins's window was broken. To prove counts one through four, the State must show Garcia was outside Collins's house. Without the smartphone's data or evidence from Garcia demonstrating his ownership of the smartphone, the State's case rests only on the complainant's word that she called Garcia's number and the recovered smartphone rang. The State can use this as circumstantial evidence to show the smartphone belonged to Garcia and argue that the jury should infer if Garcia owned the smartphone, then he was at scene when the window was broken. The State wants to compel Garcia to testify about the passcode to acquire direct evidence of ownership, strengthening the first conclusion needed in their line of inferential logic.

The State admitted in its motion to compel that "[t]he contents of [Garcia's] phone are relevant to how the events occurred and **whether** [Garcia] is guilty." Pet. App'x 17 (emphasis added). The State did not specify what information it sought in the phone. Nor did the State cite any statute or rule that authorized the trial court to compel the passcode. The motion to compel sought an order forcing Garcia to testify by disclosing the passcode to the prosecutor or police. The State asserted that police "attempted" to download the smartphone's

contents but could not because it is passcode-protected. Pet. App'x 17. The prosecutor did not detail what specific efforts investigators made to access the phone's contents.

At the hearing, the prosecutor explained she was seeking the passcode and claimed police were unable to download the smartphone's contents because it is "passcode protected and there's no way around it." Pet. App'x 22. The prosecutor conceded the fact that police had a warrant does not impact the legal analysis. Pet. App'x 23. The parties provided the court with *G.A.Q.L v. State*, 257 So. 3d 1058 (Fla. 4th DCA 2018) and *State v. Stahl*, 206 So. 3d 124 (Fla. 2d DCA 2016). Garcia's counsel asserted his Fifth Amendment right against self-incrimination, arguing that an order compelling him to disclose the passcode "would be testimonial and would be in violation of the Fifth Amendment based on [*G.A.Q.L.*]." Pet. App'x 24.

The State argued the trial court should adopt the *Stahl* court's ruling: that compelling the passcode does not compel a testimonial communication and, even if it does, the State noted the *Stahl* court contemplated that the State may be able to establish "with particularity what they're looking for is in the possession and control of the Defendant," in which case "the foregone conclusion doctrine

would provide an exception to the Fifth Amendment right." Pet. App'x 25. The trial court asked the prosecutor, "[y]ou're charging stalking; right?" Pet. App'x 25. The State confirmed aggravated stalking was one of the charges. *Id.* Then the court asked, "[a]nd is what's in the phone got to do with the stalking?" *Id.* The prosecutor confirmed "it does." *Id.* Based only on these representations, the court granted the State's motion over Garcia's Fifth Amendment objection, finding that the compelled communication is not testimonial. Pet. App'x 25, 26. The court made no comment about the foregone conclusion exception. Garcia never conceded that the smartphone belongs to him, that he possessed the smartphone, or that he knows the passcode. And the prosecutor called no witnesses and entered no evidence.

The trial court ordered Garcia to "turn over his passcodes" that day. Pet. App'x 25. The prosecutor had a detective in the courtroom to record Garcia's statements. Pet. App'x 21–22. After learning Garcia was not at the hearing, the court ordered Garcia to "turn over the passcode" the next morning. Pet. App'x 26. The court did not order Garcia to unlock or provide access to the smartphone. *Id.* The court's order from the bench is memorialized in the court minutes, which

read: "States [sic] motion to compel: Granted, over strenuous objection by defense. The defendant is to turn over the passcode to his phone to the State by 3-5-19 no later than 9:00 AM." Pet. App'x 28.

The Fifth District ruled that the trial court's order compels testimony in violation of the Fifth Amendment and issued a writ of certiorari quashing the order. *Garcia*, 302 So. 3d at 1055. The State appeals seeking a reversal because the compelled disclosure is non-testimonial, or, if testimonial, the foregone conclusion exception permits the trial court to compel Garcia to disclose the passcode. More broadly, the State asserts as fact that it cannot investigate and prosecute computer crimes without compelling passcodes. IB at 3–4. This was not established in the record below and is incorrect as a matter of fact.

More than 2,000 law enforcement agencies in the United States bought the technology necessary to decrypt smartphones without compelling defendants to disclose passcodes. *Koepke, L., et al.*, Mass Extraction: The Widespread Power of U.S. Law Enforcement to Search Mobile Phones, UPTURN, published Oct. 2020, https://www.upturn.org/reports/2020/mass-extraction/ (last

accessed June 14, 2021). Since 2015, the State has spent more than $1 million on technology used to download and search the contents of smartphones. *Id.* While that technology cannot always extract data from a passcode-protected phone, companies like Cellebrite offer software that can beat those encryptions. *Id.* The Florida Department of Law Enforcement has spent hundreds of thousands of dollars on technology used to extract data from smartphones, including software created by Cellebrite. Resp. App'x 48.[2] The State claims as fact that compelling defendants to disclose passcodes is the only way to decrypt smartphones at the heart of its investigations. IB at 3–4; Pet. App'x 22 ("[I]t's passcode protected [sic] and there isn't a way to get around it."). But this claim ignores the tools the State already possesses to decrypt and extract data from smartphones. The State wants to compel Garcia to testify to access the data within the smartphone and to determine "whether [Garcia] is guilty" of possessing the smartphone at the scene. *See* Pet. App'x 17.

[2] The contract shows the funds used by FDLE to acquire decryption technology from Tri-Tech Forensics, Inc. Resp. App'x 48.

STANDARD OF REVIEW

The State correctly states the normally applicable standards of review on issues of constitutional rights. This Court reviews questions of law de novo. *See Kopel v. Koel*, 229 So. 3d 812, 815 (Fla. 2017). And under typical circumstances, it reviews "[m]ixed questions of law and fact that ultimately determine constitutional rights…using a two-step approach, deferring to the trial court on questions of historical fact but conducting a de novo review of the constitutional issue." *City of Fort Lauderdale v. Dhar*, 185 So. 3d 1232, 1234 (Fla. 2016).

But as discussed in both the "Facts" and "Arguments" sections of this Answer Brief, the State presented no testimony or physical evidence; the court's order relied only on counsels' representations and arguments. The trial court made a single finding of law: that compelling Garcia to communicate the passcode does not compel a testimonial communication. It made no factual findings on the foregone conclusion exception. There are no historical facts in the record for this Court to review. The only applicable standard of review is de novo. *See Harris v. State*, 238 So. 3d 396 (Fla. 4th DCA 2018) (finding the tipsy coachman doctrine is inapplicable when there is no

record the trial court made the factual findings necessary for the appellate court to reach the same conclusion through different reasoning).

SUMMARY OF THE ARGUMENTS

Contrary to the State's unpreserved argument addressing an uncertified issue for this Court's review, the Fifth District Court of Appeal properly issued a writ of certiorari because the trial court's order violated the Fifth Amendment by compelling testimony under penalty of contempt or perjury, presenting a harm that cannot be adequately remedied on direct appeal. The Fifth District correctly held that the order compelling Garcia to tell the State the passcode to the smartphone recovered from the scene was an order compelling testimony in violation of the Fifth Amendment. The State had no authority under Florida statute or rules of procedure to move the trial court for an order compelling the passcode. The Fifth District was also correct in holding that an order compelling testimony is not subject to the foregone conclusion exception. The State is wrong both in characterizing the invocation against self-incrimination as a right that cannot be asserted until Garcia either proves the smartphone is not his or concedes ownership, and in characterizing the trial court's

order as merely directing Garcia to "provide access" to the smartphone through a non-testimonial act of production. Even if Garcia could comply with the trial court's order through an act of production, that act would be testimonial and not subject to the foregone conclusion exception. Finally, even if the foregone conclusion exception applies, the trial court never tried to apply it, the court received no evidence to satisfy it, and it cannot be satisfied based on the State's mere assertions.

ARGUMENTS

The State endeavors here "to build up a criminal case, in whole or in part, with the assistance of forced disclosures by the accused." *Ullman v. United States*, 350 U.S. 422, 427 (1956) (recounting the Framers' purpose in including the Fifth Amendment's privilege of silence in the Bill of Rights, and observing that the Self Incrimination Clause "should be given a liberal application"). The State maintains as fact that Garcia owns the phone, IB at 56, but at the hearing on its motion to compel, the prosecutor introduced no evidence in support of that claim. Pet. App'x 21–27; *see State v. Wooten*, 260 So. 3d 1060, 1067–68 (Fla. 4th DCA 2018) (finding that because the state offered no testimony or evidence to support its argument, "there is

no record upon which the state can rely"). What is more, the State never expressly claimed—and did not prove at the hearing below—that Garcia knows the passcode. *See* Pet. App'x 21–27. And Garcia neither stipulated to nor conceded ownership of the smartphone or knowledge of its passcode. *See* Pet. App'x 21–26; Resp. App'x 39, n. 1. Not surprisingly—since the prosecutor put on no evidence—the trial court made no express finding that Garcia owned the smartphone or knew the passcode. *See* Pet. App'x 21–28.

The State nevertheless contends that it has proven Garcia owns the smartphone by a combination of the prosecutor's evidence-free proffer below and Garcia's "silence on whether the phone was his." IB at 56. In other words, since Garcia did not offer to rebut what prosecutors failed to admit into evidence at their motion to compel hearing, this Court—the State contends—should consider Garcia's silence or non-rebuttal of the prosecutor's proffer as proof he owned the smartphone. *See* IB at 57. The State then employs circular reasoning to conclude that if it has proven Garcia owns the smartphone, then it has also proven Garcia knows the passcode. *See id* ("…the phone belongs to [Garcia] **and thus**…[Garcia] has control or possession over the phone's passcode.") (emphasis added).

I. THE FIFTH DISTRICT COURT PROPERLY EXERCISED ITS CERTIORARI JURISDICTION

The State now argues for the first time that the Fifth District lacked certiorari jurisdiction to review the trial court's order. This was not always the State's position. Raising no lack-of-jurisdiction argument below, the State urged the district court to "deny" Garcia's certiorari petition on the merits, rather than dismiss the petition for lack of jurisdiction. Resp. App'x 29. If the State's position below was that the district court lacked certiorari jurisdiction to quash the trial court's order, it would have sought *dismissal*, not denial, of Garcia's petition. *See* Philip J. Padovano, 2 Fla. Prac., *Appellate Practice* § 15:2 n.3 (2021 ed.) ("A motion to dismiss is proper to challenge the subject matter jurisdiction of the appellate court."). The State's request that the district court "deny" Garcia's petition thus concedes that the district court had jurisdiction to consider Garcia's Fifth Amendment claim on its merits and either grant or deny the petition. "[N]ormally courts do not rescue parties from their concessions." *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (Gorsuch, J., concurring in part and concurring in judgment).

Even if the State did not concede that the district court had jurisdiction to grant or deny certiorari on the merits, it failed to properly preserve the jurisdiction issue. Despite failing to preserve its argument for appeal, the State frames its case with the jurisdiction question as a threshold matter for the Court to consider before (or instead of) reaching the merits of the two certified questions and the certified conflict.

The State boldly urges this Court to redefine the Self-Incrimination Clause as a mere "trial right," even though neither this Court nor the Supreme Court has ever adopted such a radically narrow view of the Fifth Amendment. *See* State's IB, 15. If it is only a trial right, the State contends, then Garcia has suffered no Fifth Amendment harm, and therefore no "irreparable harm"—necessary for certiorari jurisdiction—because no compelled testimony has yet been used to convict Garcia **during** a criminal trial. The State is wrong about the scope of the Fifth Amendment.

Garcia answers Part I of the State's Brief as follows. First, the State waived the jurisdiction question by not properly raising and preserving the issue below. Second, this issue is beyond the certified questions and the certified conflict. Third, there is no conflict in the

district courts of appeal on the certiorari jurisdiction issue in a case like this. Fourth, the text and history of the privilege favor Garcia's argument that the Fifth Amendment applies to pretrial orders compelling testimony in a criminal case, not the State's narrow view of the Fifth Amendment as only a "trial right." Finally, this Court's and the Supreme Court's precedent favors Garcia.

A. THE STATE WAIVED ITS JURISDICTION ARGUMENT BY NOT RAISING IT BELOW

The State failed to preserve its jurisdiction by not raising it below in a motion to dismiss, or even as an argument in its response to Garcia's petition. *See 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**.") (emphasis added). "For an issue to be preserved for appeal, … it 'must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.'" *Archer v. State*, 613 So. 2d 446, 448 (Fla. 1993) (quoting *Tillman*, 471 So. 2d at 35).

A motion to dismiss may address a jurisdictional bar to an appeal. *McClain v. Florida Parole and Probation Com'n.*, 416 So. 2d 1209, 1211 (Fla. 1st DCA 1982) ("Motions to dismiss should be used primarily for procedural and jurisdictional issues."). When an appellate court lacks jurisdiction to grant a petition for writ of certiorari, the proper disposition is dismissal rather than denial. *State v. Glenn*, 294 So. 3d 1017, 1017–18 (Fla. 5th DCA 2020), citing *Bared & Co. v. McGuire*, 670 So. 2d 153, 157 (Fla. 4th DCA 1996); *see also F.T.M.I. Operator, LLC v. Limith*, 140 So. 3d 1065, 1067 (Fla. 1st DCA 2014).

That did not happen here. The State never moved to dismiss Garcia's certiorari petition on grounds that the Fifth District lacked jurisdiction. *See* Resp. App'x 22–30. Instead, the State asked the district court to "deny" Garcia's certiorari petition on the merits, arguing that the district court should adopt the Second District's reasoning in *Stahl*. Resp. App'x 29. When the State lost below, it did not seek rehearing and certification on the certiorari jurisdiction issue like it did in *Pollard*. *See Pollard v. State*, 287 So. 3d 649, 663 (Fla. 1st DCA 2019) (denying state's motion for rehearing and certification on the First District's jurisdiction and concluding

jurisdiction exists). The State is a sophisticated party, appearing often before the appellate courts; it knows how to make and preserve a record. This Court should not entertain an unpreserved jurisdictional argument that did not face the crucible of adversarial testing below.

Because the State waited until it was before this Court to make this argument for the first time,[3] it waived its jurisdictional argument by not properly preserving it. *See Page v. Deutsche Bank Trust Company Americas*, 308 So. 3d 953, 960 (Fla. 2020) (holding that the bank "waived its jurisdictional argument by waiting until the appeal of the fee award to first raise the issue"). Standing is a waivable defense. *Id.*, citing *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 842 (Fla. 1993). Because the State has not explained why this Court should consider its jurisdictional argument timely or properly preserved, the Court should conclude the State waived the issue and move on to resolve the certified questions and conflict.

[3] The State made a passing reference to the jurisdiction question in footnote 3 on the last page of its Jurisdictional Brief. The State makes a substantive argument for the first time in its Initial Brief on the merits.

B. THE STATE'S JURISDICTION ARGUMENT IS BEYOND THE SCOPE OF THE CERTIFIED QUESTIONS AND THE CERTIFIED CONFLICT

Whether the district court properly exercised its certiorari jurisdiction to review and ultimately quash the trial court's order is beyond the scope of the two certified questions and the certified conflict with the Second District's decision in *Stahl*. *See* Pet. App'x 40. Neither the certified questions nor the certified conflict with *Stahl* concerns whether a district court of appeal lacks certiorari jurisdiction to review a trial court's order granting a state motion to compel a defendant to provide a smartphone passcode in a pending criminal prosecution.

This Court should decline to address issues outside the scope of the certified conflict. *See Borden v. East-European Ins. Co.*, 921 So. 2d 587, 596 n.8 (Fla. 2006) (recognizing an issue as beyond the scope of the certified conflict and declining to address whether the Second District erred in ruling on a personal jurisdiction issue); *Kelly v. Community Hosp. of the Palm Beaches*, 818 So. 2d 469, 470 n.1 (Fla. 2002) (declining to address issues beyond the scope of the Court's conflict jurisdiction). The Court should also decline to address issues outside the scope of the certified questions. Given that district courts

are required to determine their jurisdiction independent of any party raising the issue, that the Fifth District did so below does not excuse the State's failure to preserve the issue. *See Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 803 n.6 (Fla. 2003) (declining to address issues beyond the scope of the certified question even though the Fifth District addressed additional issues); *Bloomgarden v. Mandel*, 154 So. 3d 451, 453 (Fla. 3d DCA 2014) ("Florida's appellate courts…have an independent duty to determine the existence of jurisdiction in every case and must dismiss those cases over where there is no jurisdiction."). Since the State never raised its jurisdiction argument below, the parties never briefed or argued the issue. *See Savona v. Prudential Ins. Co. of Am.*, 648 So. 2d 705, 707 (Fla. 1995) ("[N]either the federal district court nor circuit court addressed this issue, and we decline to address it in this proceeding. We have held that we have the authority to consider issues other than those upon which jurisdiction is based, but this authority is discretionary and should be exercised only when those other issues have been properly briefed and argued, and are dispositive of the case.").

C. THERE IS NO CONFLICT IN THE DISTRICT COURTS OF APPEAL ON THE JURISDICTION ISSUE

A conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). "'Express and direct conflict' is a strict standard that requires announcement of a conflicting rule of law or the application of a rule of law in a manner that results in a conflicting outcome despite 'substantially controlling facts.'" *Kartsonis v. State*, No. SC20-1500, slip op. at 2, 2021 WL 2371734 (Fla. June 10, 2021) (quoting *Nelson v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960)). Petitioner has not shown Florida's district courts of appeal are in conflict on whether district courts lack certiorari jurisdiction in cases with similar facts. Thus, the Court has not accepted conflict jurisdiction on this issue. *See* Art. V, § 3(b)(3), Fla. Const. Indeed, no district court of appeal in a smartphone passcode case has held that it lacks certiorari jurisdiction because the procedural posture of a criminal case when a Fifth Amendment objection was raised occurred before a criminal trial. *Cf. G.A.Q.L.*, 257 So. 3d at 1060 (pretrial); *Pollard*, 287 So. 3d at 651 (post-arrest,

post-charge, pretrial); *Garcia*, 302 So. 3d at 1053 (post-arrest, post charge, pretrial).

While the First District dismissed a certiorari petition on jurisdictional grounds in *Varn v. State*, *Varn's* facts are distinguishable. *See Varn v. State*, 45 Fla. L. Weekly D2079, 2020 WL 5244807 (Fla. 1st DCA Sept. 3, 2020). In *Pollard*, the First District found certiorari jurisdiction existed, while in *Varn* the court determined it lacked jurisdiction. *Id.*; *Pollard*, 287 So. 3d at 663 ("Concluding that jurisdiction exists, we deny the motion."). The court decided it lacked jurisdiction to grant a writ of certiorari because the government's discovery of relevant information on a suspect's phone was a foregone conclusion. *See Varn*, slip op. at 4.

The foregone conclusion exception to the Fifth Amendment provides that when the testimonial aspect of a compelled act "adds little or nothing to the sum total of the Government's information," any implied testimony is a "foregone conclusion," so compelling the act of production does not violate the Fifth Amendment. *Id.* (quoting *Fisher v. United States*, 425 U.S. 391, 411 (1976)). Because the foregone conclusion exception applied in *Varn*, the petitioner did not suffer the irreparable harm necessary for certiorari relief. *Varn*, slip

op. at 3–4 ("On this limited factual record, we must determine if Petitioner has shown irreparable harm; i.e., whether Petitioner's Fifth Amendment rights survive a foregone conclusion analysis." . . . "Here, the State already knew exactly what child pornography Petitioner received and viewed through the 'Sexynelly16' account. Further, Petitioner admitted he had control over the phone and used it to access that account . . . we find that on this record, the State's discovery of the pertinent information on Petitioner's cell phone is a foregone conclusion, falling within the exception to the Fifth Amendment.").

Thus, for the First District, whether irreparable harm may occur pretrial turns on whether any "constitutional rights are touched,"[4] and in *Varn* it found that no constitutional rights were touched since the state satisfied the foregone conclusion exception using Varn's post-*Miranda* admissions. *Id.* The *Varn* court's dismissal of the certiorari petition on jurisdiction grounds does not mean, however, it held that Fifth Amendment violations cannot occur outside the context of a criminal trial. On the contrary, the First District in

[4] *Fisher*, 425 U.S. at 411 (citations omitted).

Pollard found a Fifth Amendment violation pretrial, allowing the court to exercise its certiorari jurisdiction where Pollard made no admissions and it was unclear what, if any, evidence the state expected to find on his smartphone.

The State's position here that the Fifth Amendment is so narrow in scope that it only applies, if at all, **during** a criminal trial, it contradicts the *Varn* court's apparent view that the Fifth Amendment may apply outside the scope of a criminal trial if a person's "Fifth Amendment rights survive a foregone conclusion analysis." *Varn*, slip op. at 3. If the *Varn* court held the State's narrow view of the Fifth Amendment, it would not have gone through the trouble of applying the foregone conclusion analysis—the court simply would have dismissed Varn's petition because he had not been tried and convicted with compelled evidence. *See Varn*, slip op. at 2–3 (prosecutors obtained a court order to compel Varn's passcode during a criminal investigation but before the state formally charged him). The facts in *Varn* are easily distinguishable from the record here. Because all district courts that have considered the issue agree that certiorari relief can be available in criminal cases involving

smartphone passcodes compelled before trial, there is no conflict jurisdiction.

D. The State is Wrong on the Merits of Its Jurisdiction Argument

The plain text of the Self-Incrimination Clause, the structure of the Bill of Rights, and its drafting history all show that a "criminal case" includes a pretrial motion to compel hearing.

i. The Fifth Amendment's Text and Structure

The Self-Incrimination Clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Amend. V, U.S. Const. The Amendment "by its terms prevents a person from being 'compelled in any criminal case to be a witness against himself.'" *Mitchell v. United States*, 526 U.S. 314, 327 (1999) (quoting Amend. V, U.S. Const.). Based on a plain reading of the Clause and common sense, Garcia was in a criminal case when the trial court ordered him to turn over a passcode. The State had arrested and formally charged Garcia with multiple crimes, a circuit judge in the criminal division was presiding over his case, and the court appointed criminal defense counsel to represent him.

The State—pulling from a hodgepodge of non-binding case law, dicta, plurality opinions, and a 1995 law review article—posits that the terms "criminal case" and "witness" in the Self-Incrimination Clause must really mean the Fifth Amendment applies only during a "criminal trial"—and perhaps at sentencing, too. Thus, the State reasons, if the Fifth Amendment is inapplicable at the pretrial motion to compel hearing, then compulsion ordered caused Garcia no irreparable harm for certiorari relief in the Fifth District.

The State leads with dicta, IB at 15, but "we start where we always do: with the text." *Van Buren v. United States*, No. 19-783, 2021 WL 2229206 at *5 (U.S. Jun. 3, 2021); *see also Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) ("This Court adhere[s] to the supremacy-of-text principle: 'The words governing text are of paramount concern, and what they convey, in their context, is what the text means.'") (citations omitted). The Clause speaks of a "person," not just the criminally accused. Amend. V, U.S. Const. In contrast, the Sixth Amendment refers to "the accused," a narrower class of people facing criminal prosecution. Amend. VI, U.S. Const. A plain reading of the Clause would apply to

any person subpoenaed as a witness in a criminal case. The text also refers to being a witness against oneself in "any" criminal case, not one's own criminal case.

The State has no explanation for why the Framers did not just write "in any criminal trial" instead of "any criminal case" if they intended to limit the Clause only to trials. The term "criminal case" contrasts with the Framers' use of the narrower term "criminal prosecutions" in the Sixth Amendment, confirming that the use of the broader "criminal case" was a considered choice. *See* Amend. VI, U.S. Const. The Framers also used the narrower term "trial" in the Sixth Amendment's "speedy and public trial" clause, but still used the broader "case" in the Fifth Amendment. If the Framers intended the Fifth Amendment to apply in contexts narrower than "any criminal case," the Sixth Amendment shows they knew how. But they did not. The State has no answer for why the drafters would use the words they did in the Fifth Amendment when their work on the Sixth Amendment proves they were capable of the narrow construction the State would prefer.

ii. THE FIFTH AMENDMENT'S HISTORY

The State argues that given the "history and purpose" of the Self-Incrimination Clause—including the methods used to prove defendants guilty at Founding-era trials, "it makes sense" for it "to apply only at trial." IB at 18–19. The State's history is wrong, and its trial-right-only theory makes no sense in light of criminal trial practices of the Founding Era in both England and America.

When the Fifth Amendment was ratified in 1791, an accused was disqualified, because of his perceived self-interest, from giving sworn testimony at his own trial. Langbein, John H., *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1055 (1994); *see also, Ferguson v. Georgia*, 365 U.S. 570, 574 (1961) (tracing the history of the common-law incompetency rule for defendants; "Disqualification for interest was thus extensive in the common law when this Nation was formed. Here, as in England, criminal defendants were deemed incompetent as witnesses."). It was not until 1859 that criminal defendants in the United States were allowed to give sworn evidence and testify on their own behalf, when Maine became the first state to pass a law overruling the common-law disqualification rule. *Id.* at 577. If the

Self-Incrimination Clause meant in 1791 what the State claims it means today, its drafters would have no reason to include it in the Bill of Rights since the common-law at the time (and for decades after the Founding) forbade defendants from testifying under oath. The State's theory only makes sense if one ignores the historical understandings of the Clause at the time of the Founding. "To suggest that the privilege cannot be claimed except by one on trial is to confine the privilege to the only context in which it was unavailable at the founding." Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: Here I Go Down That Wrong Road Again*, 74 N.C. L. Rev. 1559, 1625 (1996).

The State's argument (IB at 17–18) about the Fifth Amendment's use of "witness" is flawed for the same reason. Given the common-law rule barring a defendant from being a "witness" at his own trial, the Framers could not have intended the term "witness against himself" to cover statements made by the defendant only at the trial.

iii. FIFTH AMENDMENT PRECEDENT FAVORS GARCIA

The State overreads a handful of cases it sometimes refers to Supreme Court "precedent," which refer to the Fifth Amendment

imprecisely as a "trial right." *See* IB at 15–16. For example it cites dicta from *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), in which the Supreme Court suggested in a single sentence that the right against self-incrimination is only a trial right. *See* IB at 15–16; *see also Chavez v. Martinez*, 538 U.S. 760, 792 (2003) (Kennedy, J., concurring in part and dissenting in part) (recognizing that "the extent of the right secured under the Self-Incrimination Clause was not…before the Court in *Verdugo-Urquidez*"). The Court retreated from that dicta nine years later in *Mitchell v. United States*, holding that the right of self-incrimination applies at sentencing hearings. *Mitchell v. United States*, 526 U.S. 314, 320-21, 327 (1999) (holding that drawing an adverse inference against a defendant at sentencing was an impermissible burden on the exercise of the right against self-incrimination).[5] The *Mitchell* Court did not even mention *Verdugo-Urquidez* and neither did the dissenting opinions, including the dissent authored by Justice Thomas.

[5] The State mentions *Mitchell* but mis-cites it as a 1990 opinion. IB at 18, n.16.

The State's "historical purpose" arguments (IB at 15–17) lean on Justice Thomas's narrow view of the Clause as expressed in *United States v. Patane*, 542 U.S. 630, 637 (2004) (plurality opinion) (describing the Fifth Amendment as "primarily focuse[d] on the criminal trial," explaining why a failure to give *Miranda* warning does not necessarily cause a Fifth Amendment violation) and *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion). When the plurality in *Chavez* cited *Verdugo-Urquidez*, it did so only to support the notion that the Self-Incrimination Clause is not violated until the "use [of the compelled statement] in a **criminal case**." 538 U.S. at 767 (plurality opinion) (emphasis added).

In *Patane*, the plurality never offered its view on the implications of using statements compelled at a pretrial hearing. In *Withrow v. Williams*, 507 U.S. 680 (1993), another case the State cites, the Court refers to the Self-Incrimination Clause as a "trial right." IB at 15. The *Withrow* Court distinguished a "completed" Fourth Amendment violation even if no charges are filed from a Fifth Amendment violation. *Withrow*, 507 U.S. at 691–92. The State oversells the significance of these cases because none of them asked the Supreme

Court to consider the use of compelled testimony during a criminal proceeding other than the trial.

The State's argument that the Self-Incrimination Clause is merely a trial right is foreclosed by *Mitchell*, 526 U.S. at 327, and *Estelle v. Smith*, 451 U.S. 454, 462–63 (1981). The Supreme Court held in both cases that the Clause applies at a sentencing hearing, which of course is not a trial. The Court in *Mitchell* reasoned that "[t]o maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." 526 U.S. at 327. In the same way, concluding that the motion to compel hearing below was not part of "any criminal case" defies the text of the Fifth Amendment and common sense. There can be no doubt the motion to compel hearing is a part of Garcia's criminal case—the State filed formal charges against him long before it sought an order compelling the passcode. According to the *Mitchell* Court, the relevant question is whether the proceedings at issue were part of the "criminal case." *Id.* at 327. Just as a sentencing hearing is part of a criminal case, so are pretrial hearings held after the State has filed formal charges. Given the Court's holdings in *Estelle* and *Mitchell* applying the Self-Incrimination Clause to parts of a criminal case besides the trial, the

State's use of dicta in *Verdugo-Urquidez*, *Withrow*, and *Patane* is unpersuasive.

The State softens its trial-right-only position by allowing—as it must, given *Mitchell* and *Estelle*—that the Fifth Amendment applies at sentencing hearings. The State reasons that sentencing hearings are kind of like trials because the focus is on punishment and that is close to a trial's concern with guilt. *See* IB at 18–19. But the State's elastic position only proves that *Verdugo-Urquidez*, *Withrow*, and *Patane* use "trial right" generally to refer to the Fifth Amendment's "criminal case" framework, not to carve out a narrower application of the Fifth Amendment.

This Court has long recognized the scope of both the federal constitutional right and the state constitutional right against self-incrimination apply outside of strictly criminal proceedings "in the orthodox sense." *State ex rel. Vining v. Florida Real Estate Commission*, 281 So. 2d 490, 491–92 (1973) (holding a statute requiring realtors respond with a sworn answer, under the threat of license revocation or suspension, to the Real Estate Commission's charges "amount[ed] to compelling the defendant to be a witness against himself within the meaning of the Fifth Amendment to the

U.S. Constitution and Article I, § 9 of the Florida Constitution, F.S.A."); *see also Omulepu v. Department of Health, Board of Medicine*, 249 So. 3d 1278, 1280 (Fla. 1st DCA 2018) (recognizing *Vining* is still good law). In *Vining*, this Court suggested that our state constitution's self-incrimination clause may provide broader protection than the Fifth Amendment, because Article I, § 9 refers to "any criminal matter," compared to the Fifth Amendment's "any criminal case." *Vining*, 281 So. 2d at 489.[6] If the Fifth Amendment Self-Incrimination Clause can apply outside strictly criminal proceedings, as this Court has held for nearly a half-century, then it applies in cases like this one where testimony is compelled in a criminal proceeding other than the trial itself.

Thus, the Fifth Amendment is violated when a court compels a defendant in a pending criminal prosecution to disclose a smartphone passcode. When a trial court compels a defendant's

[6] Because the State never argued below that the Fifth Amendment cannot be asserted during a pretrial hearing in a pending criminal prosecution, Garcia had no reason to argue that Florida's self-incrimination clause is broader than the Fifth Amendment and therefore provides a separate basis for certiorari jurisdiction.

testimony in violation of the Fifth Amendment, that is in and of itself a departure from the essential requirements of the law resulting in a material injury that cannot be corrected post-judgment. Florida's district courts of appeal may exercise their certiorari jurisdiction to prevent this type of harm. Art. V, § 4(b)(3), Fla. Const.; *G.A.Q.L.*, 257 So. 3d at 1059; *Pollard*, 287 So. 3d at 652; *Garcia*, 302 So. 3d at 1054.

II. THE TRIAL COURT'S ORDER COMPELS TESTIMONY

The Fifth Amendment provides an unqualified right against self-incrimination, shielding defendants against orders compelling testimony. "There are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts. The vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the privilege." *Doe v. United States*, 487 U.S. 201, 213–14 (1988). The privilege protects answers that, alone, would support a conviction, and also disclosures that furnish a link in the chain of evidence. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). When the State moved to compel the passcode

because it was relevant to determine "whether [Garcia] is guilty"[7], it sought testimony that, "explicitly or implicitly, relate[s] a factual assertion or disclose[s] information." *Doe*, 487 U.S. at 210. The trial court's order compels Garcia to testify. As the Fifth District held below, Garcia's Fifth Amendment privilege protects him against this order. *Garcia*, 302 So. 3d at 1055. No exception applies to his fundamental right.

Even assuming Garcia knows the passcode[8]—the State never expressly alleged, proffered, or proved that he does—the trial court's order required Garcia to use the contents of his mind to "turn over"[9] the passcode to prosecutors, either orally or in writing. Pet. App'x 25–26. Alternatively, the trial court's order allowed Garcia to give the passcode to his trial counsel and then have trial counsel give it to the State. *Id.* To comply, Garcia would have had to tell his attorney the passcode and have his attorney repeat it to the prosecutor—making his own attorney a witness—or write the passcode down for his

---

[7] Pet. App'x 17.

[8] Garcia did not concede that he owned the smartphone or knows its passcode. *See* Resp. App'x 39, n.1.

[9] Pet. App'x 25.

attorney, creating written testimony. Garcia's Fifth Amendment privilege shields him from creating such written testimony. *See Fisher* 425 U.S. at 404 (when a defendant's privilege is applicable, "'the attorney having possession of the document is not bound to produce.'" (citation omitted)). And whether the written testimony is in Garcia's hands or his attorney's, the order compels Garcia to testify in violation of the Fifth Amendment.

The State suggests a meaningful distinction between compelling Garcia to speak the contents of his mind versus writing them down, allowing the trial court's order to avoid compelling "testimony" by directing Garcia to do the latter. While the State may be able to compel a defendant's pre-existing written statement, it cannot compel a defendant to testify by creating a new statement, either orally or in writing. *See id.* at 409. The "ingredient of personal compulsion against [the] accused [that was] lacking" in *Fisher* because the government sought a document the taxpayer's accountant had that was created before the criminal investigation, *id.* at 397, is present here. Unlike the taxpayer in *Fisher*, Garcia is being compelled by the trial court to create oral or written testimony,

thus communicating his thoughts and knowledge to the State directly from his mind.

If Garcia knows the passcode and can comply with the order, his testimony would confirm the State's otherwise unproven assertion that he owns the phone and controlled it at the time of the incident. The State will use that inference to tie Garcia to any incriminating data on the smartphone. The State is also relying on the "truth-telling" element of the compelled testimony to prove Garcia's knowledge of the passcode, and thus his prior possession and ownership of the smartphone. *See id.* at 411 (the order does not compel testimony where the order does not rely on taxpayer's "truth-telling" for the government to access the information it seeks); *Doe*, 487 U.S. at 215 (noting the defendant was not compelled to testify where he was ordered to execute a consent form that contained no admissions and did not rely on his "truthtelling" to provide the government with the information it sought).

Forcing Garcia to reduce his thoughts and memory to writing does not change the testimonial nature of the compelled disclosure. Compelled oral testimony is synonymous with the compelled written disclosures; they have the same testimonial value. Whether the order

compels Garcia to disclose the contents of his mind orally or by writing the same disclosure on a piece of paper, there is "no principle which does not permit compelling one to disclose the contents of one's mind but does permit compelling the disclosure of the contents of that scrap of paper by compelling its production." *Fisher*, 425 U.S. at 420 (Brennan, J. concurring).

The Fifth District correctly decided the foregone conclusion exception does not apply to compelled testimony. *Garcia*, 302 So. 3d at 1056. "To compel a defendant, such as Garcia, to disclose the passcode to his smartphone under this exception would, in our view, sound 'the death knell for a constitutional protection against compelled self-incrimination in the digital age.'" *Id.* at 1057 (quoting *Commonwealth of Massachusetts v. Jones*, 481 Mass. 540, 117 N.E.3d 702, 724 (2019)). Applying the foregone conclusion exception here would swallow the constitutional privilege whole. No matter if compelling the passcode would make the State's job easier,[10] prosecutorial convenience is no reason for skirting fundamental rights.

[10] IB at 3–4, 11–12, 46–52.

III. THE TRIAL COURT LACKED THE AUTHORITY TO COMPEL THE PASSCODE

The State invites this Court to take up a jurisdiction issue that it did not argue below, raising it for the first time in a footnote on the last page of the State's jurisdiction. Pet. Juris. Br., 9, n.3. Should the Court address that unpreserved issue, it should also consider whether the trial court had any authority to order disclosure of the passcode in the first instance.

A basic tenet of pretrial motions is that every "motion or pleading shall state the ground or grounds on which it is based." Fla. R. Crim. P. 3.190(a). Here, the State's motion to compel cited no rule or statutory ground for compelling Garcia's passcode. Pet. App'x 17. The only grounds the State gave are that the passcode would be relevant to show how the events occurred and to show whether Garcia is guilty. In other words, the State wanted it—that was their grounds.

Motions to compel stem from compelling missing discovery. *See State v. Gillis*, 876 So. 2d 703 (Fla. 3d DCA 2004) (state flouted the initial discovery request and four motions to compel discovery). Florida Rules of Criminal Procedure 3.220 governs discovery and

specifies what evidence each party must disclose. Subdivision (d)(1)(B) requires a defendant to disclose to the state any expert reports, any tangible papers or objects that a defendant intends to use at a hearing or trial, and the statements of anyone on the defense witness list "other than the defendant." This subdivision specifically exempts the defendant from providing a statement, something that the State currently seeks. Subdivision (c) lists what a court may require a defendant to do: appear in a lineup; speak for identification by witnesses to an offense; be fingerprinted; pose for photographs; try on articles of clothing; permit the taking of specimens of material under the defendant's fingernails; permit the taking of samples of the defendant's blood, hair, and other material of the defendant's body; provide handwriting samples; and submit to a physical or medical body inspection. Nowhere in this exhaustive and detailed list does it allow a court to compel a defendant to provide a passcode.

Anything not listed in subdivision (c) is specifically excluded. "'Under the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another.' . . . Put even simpler, 'when a statute . . . lists the areas to which it applies, it will be construed as excluding from its reach any

areas not expressly listed.'" *Brown v. State*, 263 So. 3d 48, 51 (Fla. 4th DCA 2018) (citations omitted).[11] Nothing in rule 3.220, or elsewhere in the rules of criminal procedure, authorizes the trial court to compel a defendant to provide a passcode. *See Kidder v. State*, 117 So. 3d 1166, 1170 (Fla. 2nd DCA 2013) (observing that rule 3.220(d)(1)(B)(ii) is clear and unambiguous in requiring a defendant to disclose the results of a scientific test and courts will not look behind the rule's plain language or resort to rules of construction to ascertain intent). Only the Florida Supreme Court can add words to rules by amending them. Art. V, § 2(a), Fla. Const.; *Citigroup Inc. v. Holtsberg*, 915 So. 2d 1265, 1269 (Fla. 4th DCA 2005) ("[A] district court of appeal cannot adopt a doctrine which arguably conflicts with the discovery rules . . . only the Florida Supreme Court has this authority."); *see also State v. Geiss*, 70 So. 3d 642, 647–48 (Fla. 5th DCA 2011) ("If the legislature had intended the implied consent statute to modify the warrant statute, it easily could have

[11] Rules of statutory construction apply to the construction of rules. *See, e.g.*, *Brown v. State*, 715 So. 2d 241, 243 (Fla. 1998) ("Our courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules.").

said so . . . [I]t is not our place to read into the statute a concept or words that the legislature itself did not include.").

Chapter 27.04, Florida Statutes, authorizes the State to issue investigative subpoenas to compel testimony, including passcodes. *See State v. Doe*, 592 So. 2d 1121, 1122 (Fla. 2d DCA 1992), *citing* § 27.04, Fla. Stat. (1989) ("The state attorney also has the statutory right to summon witnesses to testify concerning any violation of the law."). But using its chapter 27 powers here would have resulted in the State granting Garcia use and derivative use immunity. § 914.04, Fla. Stat. (2020); *Costello v. Fennelly*, 681 So. 2d 926 (Fla. 4th DCA 1998) ("section 914.04['s] grant of immunity subsumed [petitioner's] privilege to remain silent"), citing *Novo v. Scott*, 438 So. 2d 477 (Fla. 3d DCA 1983) (subpoena for testimony provided use and derivative use immunity). Section 914.04 provides that no testimony or "evidence so produced" given before a grand jury or state attorney investigation, proceeding, or trial, shall be used against that person. Not only would the disclosure of the passcode and any information derived using the passcode be exempt, but so would testimony that Garcia knew and used a valid passcode. The State could not use that testimony to prove Garcia owned, controlled, or possessed the

smartphone before police collected it at the scene, or that Garcia is responsible for any incriminating data found in the smartphone. So rather than use its statutory subpoena power to get the information it sought and risk providing Garcia with immunity, the State moved to compel citing no authority in Florida's statutes or rules of procedure.

The Legislature enacted Florida Statutes §§ 27.04 and 914.04, providing the State with a clear and unambiguous mechanism for conferring immunity and compelling testimony that overcomes a witness's Fifth Amendment privilege. The trial court's order here allows the State to circumvent its ordinary obligation to grant immunity. By allowing the State to avoid these two statutes and instead compel testimony rooted in a non-existent rule or statute without the ramification of immunity, the trial court improperly ran a backdoor to § 914.04 and added more to rule 3.220(c)(1) than what is listed. "Under the separation of powers requirement of our state's constitution, when interpreting a statute, it is not the judiciary's prerogative to question the merit of a policy preference or to substitute its preference for the legislature's judgment." *Fast Tract Farming, Inc. v. Caraballo*, 994 So. 2d 355, 357 (Fla. 1st DCA 2008),

citing Art. II, § 3, Fla. Const. As this Court stated in *State v. Rife*, "[w]hen faced with an unambiguous statute, the courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.'" *State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001) (citations omitted). By calling it a *Motion to Compel* with no legal grounds, the State attempts to modify and limit Florida Statutes §§ 27.04 and 914.04—compelling the evidence but avoiding immunity.

IV. THE FOREGONE CONCLUSION EXCEPTION DOES NOT APPLY

The foregone conclusion exception applies only where "[t]he existence and location of the [incriminating evidence] are a foregone conclusion and the [defendant] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the [evidence]." *Fisher*, 425 U.S. at 410. The United States Supreme Court reasoned that under these circumstances, where the compelled act "adds little or nothing" to the evidence already within the prosecution's possession, "'no constitutional rights are touched.

The question is not of testimony but of surrender.'" *Id.*, citing *In re Harris*, 221 U.S. 274 (1911).

The State argues the trial court's order only requires Garcia to "provide access" to the phone, potentially by taking momentary possession of the phone, entering a code the State alleges Garcia knows that will unlock the phone, and returning it to the State. IB at 50–51. This "act" of "providing access" still provides evidence in and of itself that the State does not currently have, so it is not an act "of surrender." *Fisher*, 425 U.S. at 410. Though the State attempts to couch the trial court's order as only mandating Garcia to conduct an "act of production," the act of unlocking the smartphone would by itself add substantial, direct evidence to the State's case in addition to any incriminating data that might be found on the unlocked smartphone.

As mentioned, the State sought an order compelling a passcode from Garcia rather than subpoenaing him to provide a passcode under its Chapter 27 investigative powers. The latter option mandates use and derivative use immunity by statute, a consequence that would prevent the State from arguing at trial that Garcia's act of unlocking the phone proves he owned or possessed it,

making it likely he was at the scene where police found the phone. *See* § 914.04, Fla. Stat. (2020). The State's deliberate choice to move for an order compelling the passcode allowed the State to avoid conferring use immunity. Free from the constraints that immunity, prosecutors could put Garcia at the scene by connecting the smartphone found there to Garcia. Had the trial court required Garcia to provide the passcode the following morning, the State could have had the detective present again in court to witness Garcia's statements or actions in compliance with the order. The State could call that detective as a witness to testify about Garcia's disclosures, or even just the act of unlocking the phone if Garcia knows the passcode. Even if Garcia can unlock the smartphone and a search of its contents reveals nothing incriminating, the fact that Garcia could unlock it would allow prosecutors to connect the smartphone to Garcia, establishing his location at the time of the charged offenses.

Justice Stevens, in his dissenting opinion in *Doe*, 487 U.S. 201, wrote that the foregone conclusion exception should not be applied when the compelled act calls on a defendant to reveal the contents of his mind.

> A defendant can be compelled to produce material evidence that is incriminating. Fingerprints, blood samples, voice exemplars, handwriting specimens, or other items of physical evidence may be extracted from a defendant against his will. But can he be compelled to use his mind to assist the prosecution in convicting him of a crime? I think not. He may in some cases be forced to surrender a key to a strongbox containing incriminating documents, but I do not believe he can be compelled to reveal the combination to his wall safe—by word **or deed**.
>
> […]
>
> If [a defendant] can be compelled to use his mind to assist the Government in developing its case, I think he will be forced "to be a witness against himself."

Id. at 220 (Stevens, J., dissenting) (emphasis added) (finding no distinction between an order compelling testimony verbally as opposed to by an act of production if both rely on the defendant's mind).

The State tries to analogize the compelled act here to executing the consent forms discussed in *Doe*. *Id.*; IB at 27–28. This comparison is flawed. Unlike the trial court's order here, the defendant in *Doe* was compelled to sign consent forms to 12 accounts for foreign banks that would turn over bank records Doe conceded

were not privileged. *Id.* at 206. And if any of the 12 forms provided consent to a non-existent account, Doe's execution of the form by itself provided no information or evidence of any testimonial value. *See id.* The act of signing the consent forms did not constitute an admission that Doe had accounts at any of the banks. *See id.* The purpose of the forms was only to comply with each banking institutions' consent requirements so that, if Doe ended up having an account, the bank would comply with a U.S. subpoena. *Id.* at 202–203.

These observations led to the Supreme Court's determination that executing the consent forms constituted a non-testimonial act of production. The Supreme Court specifically noted that the consent forms were "not 'testimonial'" because they were "carefully drafted not to make reference to a specific account, but only to speak in the hypothetical." *Id.* at 215 (citations omitted). The forms "d[id] not acknowledge that an account . . . is in existence or that it is controlled by petitioner," or "identify any incriminating evidence." *Id.* Because it lacked these representations, the government was not "relying upon the 'truthtelling' of Doe's directive to show the existence of, or his control over" incriminating evidence. *Id.* at 215 (citations omitted).

All the testimonial features missing from the consent forms in *Doe* are, however, present here. Compelling Garcia to provide the passcode is an act that relies on his "truthtelling"—if he provides an incorrect passcode, the State cannot access the smartphone's contents and depending on its settings, the smartphone might even self-delete its contents. Assuming the State can show Garcia knows the passcode, Garcia risks perjury or contempt charges if he does not provide it or provides the wrong passcode. And the act of providing the passcode would be direct evidence—arguably the strongest evidence—that Garcia owns the smartphone, possessed it when it was left at the scene, and is the owner/creator of any incriminating data on the smartphone. Providing a smartphone passcode is nothing like executing the bank consent forms in *Doe*. Instead, it is analogous to a defendant providing both consent to seize bank account records and an admission identifying which of his accounts hold incriminating evidence. Because compelling the passcode has these added qualities, even unlocking the smartphone as an act of production would be akin to testifying.

Even if Garcia knows the passcode, besides providing a testimonial communication, an order compelling Garcia to unlock the

smartphone as an act of production would require him to use the contents of his mind. The trial court's order, if enforced, would convert Garcia into an agent of the state, forcing him to use the contents of his mind to aid the State in prosecuting him. The very act of complying with the order will, by itself, provide pivotal evidence for the prosecution. And even if the order compelled Garcia only to enter the passcode into the smartphone, this "act of production" would provide the same evidence as an order compelling Garcia to make an oral or written statement conveying the passcode. The foregone conclusion exception should not apply when, as here, the order does not truly compel a mere "act of production" as the Supreme Court defined that term in *Fisher* and *Doe*.

V. THE STATE HAS NOT ESTABLISHED A FOREGONE CONCLUSION

A. THE STATE MUST PROVE THE FOREGONE CONCLUSION EXCEPTION BEYOND A REASONABLE DOUBT

If the trial court's order compels an act of production subject to the foregone conclusion exception, the State must prove beyond a reasonable doubt that the exception is met. Satisfying the exception requires the State to prove: the incriminating material it seeks, identified with reasonable particularity, is on the smartphone; that

Garcia possessed the smartphone; that the smartphone is passcode-protected; and that Garcia knows the passcode. Only then could the trial court conclude the act of production has no testimonial value, that it "adds little or nothing to the sum total of the government's information." *Fisher*, 425 U.S. at 410. But the State asks this Court to adopt a test so paltry[12] it would render the Fifth Amendment right against self-incrimination worthless. The Court should apply a rigorous evidentiary test to any exception it applies to a fundamental right. To hobble the Fifth Amendment, the State must be required, first, to describe with reasonable particularity the incriminating material it believes lies beyond the passcode wall. And assuming the State does so, the State must show beyond a reasonable doubt that: (1) Garcia can provide the passcode to the smartphone; and (2) that the particularly identified evidence is on the smartphone.

Contrary to the State's argument, the foregone conclusion exception requires the State to articulate with reasonable particularity what incriminating material it seeks. The State claims this requirement confuses Fourth Amendment and Fifth Amendment

[12] I.e., the preponderance standard. IB at 52–55.

jurisprudence. IB at 44–46. But in the context of an order compelling a defendant to become an agent of the state aiding police in executing a search, the Fourth Amendment and Fifth Amendment requirements naturally interlock. The First District addressed in *Pollard* whether a reasonable particularity requirement conflates the Fourth and Fifth Amendments, commenting that "the relationship that exists between the Fifth Amendment right against compelled personal disclosures and its neighboring and complementary Fourth Amendment right against unreasonable searches and seizures counsels in favor of protection against governmental overreach into individual autonomy in criminal cases." *Pollard*, 287 So. 3d at 663, citing *Levy, Leonard W.*, Origins of the Fifth Amendment 431 (1968).

If the State's search warrant is overbroad, then the State cannot identify with reasonable particularity the incriminating evidence they want to force Garcia to help them find. But Garcia has to triage his constitutional rights. If he moves to quash the search warrant as overly broad in violation of the Fourth Amendment, he must establish standing by showing he has a privacy interest in the smartphone. Doing that requires Garcia to provide the type of admission his Fifth Amendment privilege is meant to protect. Because his constitutional

rights cannot be pitted against each other forcing him into an ultimatum where he must choose only one and waive the other,[13] the State must show that its search is constrained to, and the compelled disclosure will lead to, particularly identified, relevant evidence.

However, the State contends the Court should not expect it to identify the incriminating evidence sought on the smartphone with any degree of particularity. IB at 44–46, 52–55. But the State's argument also hinges on the compelled act of providing access to the phone being an act of production that will provide "little or nothing to the sum total" of its evidence against Garcia because "[t]he existence and location of the [incriminating evidence] are a foregone conclusion." *Fisher*, 425 U.S. at 410. It is integral to the foregone conclusion exception that the "existence and location" of the incriminating evidence be so readily apparent that providing access to the phone "adds little or nothing to the sum total" of the State's

[13] *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (holding that a defendant does not waive his Fifth Amendment right to remain silent at trial by testifying at a pretrial suppression hearing). This Court has held that a defendant is entitled to this same protection when he testifies in support of a motion to suppress a confession. *Hayes v. State*, 581 So. 2d 121, 125–26 (Fla. 1991).

evidence. *Id.* Here, the State wants the Court to find that compelling Garcia to unlock the phone adds little or nothing to the information it already has, yet the State cannot identify what relevant, incriminating evidence it believes is on the smartphone with reasonable particularity.

The State also confuses the reasonable particularity requirement for a search warrant with the probable cause burden. The reasonable particularity requirement, while part of the probable cause analysis, is used to prevent the warrant from having impermissible scope, while the probable cause burden is the evidentiary burden police must meet to demonstrate the requisite suspicion of criminal activity necessary to get the warrant. Requiring the State to describe with reasonable particularity what incriminating evidence it seeks is part of the burden it bears to apply the foregone conclusion exception, but it cannot be where the analysis ends. The State must also show the truth of the asserted facts, including that the particularly identified evidence exists on the smartphone, is a foregone conclusion by some evidentiary standard.

Requiring the State both to describe with reasonable particularity what evidence is on the smartphone and prove a

defendant can unlock the smartphone leading to that evidence serves two distinct purposes. The reasonable particularity requirement ensures the state cannot just trawl the phone, fishing for any evidence. The evidentiary burden ensures that the existence and location of the particularly identified evidence, along with the defendant's ability to unlock the smartphone, are in fact a foregone conclusion based on the evidence the State already has. Simply showing evidence that reveals why the state believes a person engaged in some illegal conduct does not permit the state to ignore the Fourth Amendment and conduct sweeping, general searches. Similarly, without specifying the evidence sought in Garcia's smartphone, the State should not get a pass to trample the Fifth Amendment and compel Garcia to help police execute an impermissibly broad search.

The State's proposed preponderance standard would undermine the Fifth Amendment's protection against self-incrimination. IB at 52–55. By definition, a foregone conclusion is "an

inevitable result," a "certainty."[14] A claim established only by a preponderance of the evidence, suggesting that it is only slightly more likely than not to be true, does not rise to the level of confidence required for it to be "inevitable" or a "certainty." The plain meaning of a foregone conclusion fits seamlessly with the beyond-a-reasonable-doubt standard. *State of Oregon v. Pittman*, 367 Or. 498, 531 (Or. 2021) ("[T]o prove facts 'beyond a reasonable doubt,' the proponent must establish that the facts asserted are 'almost certainly true.'" (citations omitted)). The Oregon Supreme Court and Massachusetts Supreme Court each applied this standard. *Pittman*, 367 Or. at 532–33; *Jones*, 481 Mass. at 552–53.

While both decisions were reached partly on state-law grounds, these decisions also reflected on the need for the beyond-a-reasonable-doubt standard to achieve the "purpose of the foregone conclusion exception." *Jones*, 481 Mass. at 553. The *Jones* court ruled that the very term "foregone conclusion" suggests "the government must be certain that the facts conveyed by a compelled

[14] *Foregone Conclusion*, MERRIAM-WEBSTER.COM, https://tinyurl.com/5ha4688p (last visited June 14, 2021).

act of production are already known before it can properly be considered a **foregone** conclusion." *Id.* at 553–54 (emphasis in original), citing *Foregone conclusion*, Black's Law Dictionary 762 (10th ed. 2014) ("defining 'foregone conclusion' as '[an] inevitable result; a foreordained eventuality'"). The *Jones* court also cautioned that a lower standard "creates a greater risk of incorrectly imputing knowledge to those defendants who truly do not know the password," subjecting the defendant to contempt for failing to fulfill an order with which the defendant "could not possibly comply." *Id.* at 555.

Likewise, the Oregon Supreme Court reasoned in *Pittman* that "requiring proof beyond a reasonable doubt provides necessary assurance that the state really does know the facts that the act of unlocking will convey." *Pittman*, 367 Or. at 533. The *Pittman* court, too, was concerned that a defendant's failure to comply with the order would subject the defendant to contempt charges. *Id.* The court found this ultimatum—forcing the defendant "to choose between relinquishing his or her right against self-incrimination or, potentially, facing punitive contempt proceedings"—reinforced the need to apply the beyond-a-reasonable-doubt standard. *Id.* The court also observed that the state would end up having to prove the

defendant could have complied with the order beyond reasonable doubt at a criminal contempt proceeding. *Id.* If the state would need to demonstrate proof beyond a reasonable doubt to enforce the order through contempt despite the Fifth Amendment invocation, the state should face the same burden to bypass the Fifth Amendment privilege to get the order to compel in the first place. Otherwise, the defendant is left in the absurd position of triggering a higher burden of proof by refusing or failing to comply with a court order.

Should the Court find this burden inapplicable, the Fifth Amendment provides practically no protection if the State does not at least have to provide clear and convincing evidence to satisfy the foregone conclusion exception. As the Northern District Court of California held in *United States v. Spencer*, 2018 WL 1964588 (N.D. Cal. April 26, 2018), the clear-and-convincing standard "places a high burden on the government to demonstrate the defendant's ability to decrypt the device at issue is a foregone conclusion." The *Spencer* court believed "a high burden is appropriate" for an exception "to the Fifth Amendment's otherwise jealous protection of the privilege against self-incriminating testimony." *Id.* (citations omitted).

To vitiate Garcia's Fifth Amendment right against self-incrimination, the State must prove beyond a reasonable doubt, or at least by clear and convincing evidence: that the smartphone is passcode-protected; that Garcia owned or possessed the smartphone; that Garcia knows the passcode; and that particularly identified, relevant evidence exists on the smartphone.

B. THE STATE HAS NOT MET THE REQUIREMENTS OF THE FOREGONE CONCLUSION EXCEPTION

The State claims the information they are seeking on the phone is a foregone conclusion but fails to identify that information with reasonable particularity. The State's *Motion to Compel* seeks no particular information on the smartphone. Pet. App'x 17. Tellingly, State's motion says: "The contents of the Defendant's phone are relevant to how the events occurred and **whether** the Defendant is guilty." Pet. App'x 17 (emphasis added). This stand-alone statement, a blanket quest for the broad category of "contents" that are "relevant," lacks any specificity. The State fails to identify specific file locations or even describe particular files it seeks from the smartphone. The State's use of the phrase "whether the Defendant is guilty" confirms it lacks specific information indicative of guilt.

Rather, the State wants to download all the data from the smartphone and then cull for anything it finds relevant. The search warrant application shows the State does not know with a "certainty"[15] that relevant information exists on the smartphone. *See* Pet. App'x 10. In its application for search warrant, police request to search and analyze the entire smartphone. *Id.* This is a general warrant to search the entire contents of the smartphone. It fails to state with any particularity what file, app, or folder locations it seeks. *Id.* The state in *G.A.Q.L.* argued at its motion hearing that it sought communications in Snapchat and text messages. *G.A.Q.L.*, 257 So. 3d at 1064. The Fourth District found even that did not prove that the Snapchat and text files were located specifically on the smartphone. *Id.* "It is not enough for the state to infer that evidence exists—it must identify what evidence lies beyond the passcode wall with reasonable particularity." *Id.* Here, the State neither identified with reasonable particularity what evidence it seeks, nor showed that the evidence is on the smartphone.

[15] *Foregone Conclusion*, MERRIAM-WEBSTER.COM, https://tinyurl.com/5ha4688p (last visited June 14, 2021).

The State presented no evidence at the motion to compel hearing, and the trial court made no finding regarding the foregone conclusion exception. The State offered only its bare assertion that the smartphone belongs to Garcia and its conclusory claim to the trial court that "what's in the phone [has] to do with the stalking." Pet. App'x 25. That is it. "The state is simply advancing an 'it is because I say it is' position." *Wooten*, 260 So. 3d at 1067. In *Wooten*, the state's arguments at the trial court level differed from those it raised before the Fourth District. *Id.* The state presented no testimony or evidence to support its arguments. *Id.* at 1068. The Fourth District found that since the state did not offer any evidence below to support its assertions, there was no record upon which the state could rely. *Id.* ("In this case, the state did not offer any evidence that the redacted information contained 'surveillance techniques' under section 119.071(2)(d) nor did the state demonstrate that the alleged surveillance techniques were 'not widely known.'"). Likewise, no record here supports the State's arguments other than its *ipse dixit* reasoning.

The State's "proof" that the smartphone belongs to Garcia is his counsel's invocation of his Fifth Amendment privilege in the face of

the State's evidence-free assertions. The State impermissibly shifts the burden, arguing Garcia had to dispute the State's empty assertions or suffer an adverse inference that he owned the smartphone and knows the passcode. IB at 56. According to the State, it was Garcia's responsibility to seek an evidentiary hearing and establish he was not the owner. IB at 57. The State cites no authority for this novel reinvention of the Fifth Amendment privilege.

According to the State, when a defendant invokes his Fifth Amendment privilege rather than contest the State's claims, the defendant's invocation creates an adverse inference that satisfies the foregone conclusion exception. Just as a court cannot draw an adverse inference from the defendant's silence at sentencing to determine the facts of the offense, *Mitchell*, 526 U.S. at 330, this Court should not allow the State to prove the foregone conclusion exception with an adverse inference drawn from the Fifth Amendment invocation at a pretrial hearing when the presumption of innocence is still intact. That argument places Garcia in a catch-22 where he must either contest the prosecutor's evidence-free assertions—thereby forcing him to testify—or invoke the privilege of

silence which the State will use as evidence to prove the foregone conclusion exception.

The State also suggests Garcia had an obligation to request an evidentiary hearing where he bears the burden of proving he is not the owner of the smartphone. IB at 57. According to the State, a defendant must bear witness against himself before invoking the Fifth Amendment privilege to remain silent. No, that is not the law. The burden is on the State alone to prove the foregone conclusion exception. The State offered no evidence at its own motion hearing. It therefore failed to meet any evidentiary burden. And the trial court did not make any relevant findings of fact or rule that the foregone conclusion exception was met. Without findings of fact in the record, even the tipsy coachman doctrine cannot save the State. *See Harris*, 238 So. 3d at 403.

CONCLUSION

An order directing a defendant to tell the State the passcode to a smartphone has no statutory or rule-based authority and compels testimony in violation of the Fifth Amendment right against self-incrimination. Even if the order called for an act of production, the foregone conclusion exception cannot apply because the act of

production has the same evidentiary value as compelled testimony. And if the Court applies the foregone conclusion exception, the State must prove beyond a reasonable doubt: that the smartphone is passcode-protected; that Garcia owned or possessed the smartphone; that Garcia knows the passcode; and that the smartphone contains particularly identified, relevant evidence. The State has not shown that anything in this case is a "foregone conclusion."

The Court should resolve the certified conflict and questions by affirming and adopting the Fifth District Court's ruling.

Respectfully submitted,

ROBERT WESLEY, B.C.S.
Public Defender

By: _____

ROBERT THOMPSON ADAMS IV
Florida Bar No. 107152
Assistant Public Defender

CATHERINE CONLON, B.C.S.
Florida Bar No. 663271
Assistant Public Defender

DAVID L. REDFEARN, B.C.S.
Florida Bar No. 21228
Assistant Public Defender

MARIE TAYLOR
Florida Bar No. 1003697
Assistant Public Defender

Office of the Public Defender
435 N. Orange Ave., Suite 400
Orlando, FL 32801
407-270-0402
radams@circuit9.org
cconlon@circuit9.org
dredfearn@circuit9.org
mtaylor@circuit9.org

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished via the e-Filing Portal to the Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399, amit.agarwal@myfloridalegal.com, jeffrey.desousa@myfloridalegal.com, christopher.baum@myfloridalegal.com, and jason.hilborn@myfloridalegal.com on this the 14th day of June, 2021.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief, submitted in 14-point Bookman Old Style, complies with the font, word-count length, and content requirements of Florida Rules of Appellate Procedure 9.045, 9.210.

ROBERT WESLEY, B.C.S.
Public Defender

By: _____

ROBERT THOMPSON ADAMS IV
Florida Bar No. 107152
Assistant Public Defender
435 North Orange Avenue Suite 400
Orlando, Florida 32801
radams@circuit9.org
(407) 270-0402