

IN THE SUPREME COURT OF FLORIDA

No. SC20-1419

STATE OF FLORIDA,
Petitioner,

v.

JOHNATHAN DAVID GARCIA,
Respondent.

On Petition for Discretionary Review
from the Fifth District Court of Appeal
DCA No. 5D19-590

**AMENDED MOTION FOR LEAVE TO FILE AS *AMICI CURIAE*
BY AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AND
ELECTRONIC FRONTIER FOUNDATION**

The American Civil Liberties Union (“ACLU”), American Civil Liberties Union of Florida, and the Electronic Frontier Foundation (“EFF”) respectfully move, pursuant to the Florida Rules of Appellate Procedure 9.370(a), for leave to file an *amici curiae* brief in support of Respondent in the above-captioned matter.¹

1. Statement of Interest of *Amici Curiae*

¹ Under Florida Rule of Appellate Procedure 9.370 (c), *amici* briefs in support of Respondent are due 10 days after the initial brief. The deadline for that initial brief is currently May 13, 2021.

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The ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles embodied in the Federal Constitution and our nation's civil rights laws. For decades, the ACLU has been at the forefront of efforts nationwide to protect the full array of civil rights and liberties, including the right to the protections enshrined in the Fourth and Fifth Amendments to the Federal Constitution. The ACLU of Florida is a state affiliate of the ACLU. The ACLU and the ACLU of Florida have appeared in numerous cases, both as direct counsel and as *amici*, before courts in Florida and throughout the nation in cases involving the meaning and scope of the rights of criminal defendants and the legal limitations on the use of technology by police and prosecutors.

The Electronic Frontier Foundation (“EFF”) is a member-supported, nonprofit civil liberties organization that has worked to protect free speech and privacy rights in the online and digital world for nearly 30 years. With roughly 40,000 active donors, EFF represents technology users' interests in court cases and broader policy debates. EFF regularly participates as *amicus* in federal and state courts, including in the United States Supreme Court, in cases addressing the impact of novel technologies on criminal investigations and the justice system.

The ACLU and EFF have been involved, either as *amicus* or as counsel in multiple state and federal cases litigating the scope of the Fifth Amendment privilege against self-incrimination in the context of court orders to unlock mobile

phones or other electronic storage devices. *See In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335 (11th Cir. 2012) (*amici*); *United States v. Apple MacPro Computer*, 851 F.3d 238 (3d Cir. 2017) (*amici*); *Commonwealth v. Davis*, 220 A.3d 534 (Pa. 2019), *cert denied*, No. 19-1254, 2020 WL 5882240 (2020) (ACLU as counsel and EFF as *amicus*); *See Seo v. State*, 148 N.E.3d 952, 958 (Ind. 2020) (*amici*); *State v. Pittman*, 452 P.3d 1011, 1014 (Or. 2019) (*amici*); *State of New Jersey v. Andrews*, 234 A.3d 1254 (N.J. 2020) (petition for cert pending) (counsel).

2. Particular Issues to Be Addressed

Amici Curiae seek to address two issues.

First, we will explain that compelled recollection, disclosure, or use of a passcode by the target of a criminal investigation is testimony privileged by the Fifth Amendment right against self-incrimination. The narrow and limited federal foregone-conclusion rationale has no application in this case.

Second, if this Court holds that the foregone-conclusion rationale does apply, *amici* seek to explain why the State must describe with reasonable particularity the incriminating files it seeks. Evidence regarding knowledge of the passcode or ownership of the device alone is not enough to defeat the testimonial nature of password disclosure, entry, or use.

3. How *Amici Curiae* Can Assist the Court in Disposing of the Case

The organizations seeking to file an *amici curiae* brief have knowledge and experience, both locally and nationally, with the meaning and scope of the rights of criminal defendants; the legal limitations on the use of technology by police and prosecutors; the impact of novel technologies, including encryption and other device security measures, on criminal investigations and the justice system; and the application of proven scientific methodology in criminal cases. These organizations, therefore, can assist the Court's understanding of the legal and factual issues in the case.

Certificate of Conferral

Pursuant to Fla.R.App.P. 9.370(a), *amici* conferred with the parties' counsel in this proceeding about their consent to the *amici* filing a brief. Respondent Garcia and Petitioner State of Florida both consent.

Respectfully submitted,

/s/ Daniel B. Tilley

Daniel B. Tilley
Fla. Bar No. 102882
ACLU Found. of Fla.
4343 West Flagler St. #400
Miami, FL 33134
T. 786.36.2714
dtilley@aclufl.org

Benjamin James Stevenson
Fla. Bar. No. 598909
ACLU Found. of Fla.
3 W. Garden St., Suite 712
Pensacola, FL 32502-5636
T. 786.363.2738
bstevenson@aclufl.org

Counsel for Amici Curiae

Jennifer Lynch
Andrew Crocker
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
T. 415.436.9333
jlynch@eff.org

Brett Max Kaufman
ACLU Foundation
125 Broad Street, 18th Fl.
New York, NY 10004
T. 212.549.2500

Jennifer S. Granick
ACLU Foundation
39 Drumm Street
San Francisco, CA 94111
T. 415.343.0758
jgranick@aclu.org

Of Counsel

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the following persons on the E-filed date of this document by filing the document with service through the e-Service system (Fla.R.Jud.Admin. 2.516(b)(1)):

Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>—Counsel for the State

Marie Taylor <mtaylor@circuit9.org>, Robert Adams <radams@circuit9.org>,
Counsel for Respondent

/s/ Daniel B. Tilley
Daniel B. Tilley