

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

**MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE*
BY NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

The National Association of Criminal Defense Lawyers (“NACDL”) respectfully moves, pursuant to the Florida Rules of Appellate Procedure 9.370(a), for leave to file an *amicus curiae* brief in support of Respondent in the above-captioned matter.¹ NACDL seeks to join the brief of the American Civil Liberties Union, the American Civil Liberties Union of Florida, and the Electronic Frontier Foundation.

¹ Under Florida Rule of Appellate Procedure 9.370 (c), *amicus* briefs in support of Respondent are due 10 days after the initial brief. The deadline for that initial brief was June 14, 2021.

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1. Statement of Interest of *Amicus Curiae*

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates comprised of private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL has a particular interest in cases that involve surveillance technologies and programs that pose new challenges to personal privacy. NACDL operates the Fourth Amendment Center and has filed numerous amicus briefs on issues involving digital privacy rights, including *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Riley v. California*, 573 U.S. 373 (2014); and *United States v. Jones*, 565 U.S. 400 (2012).

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 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 Florida Rule of Appellate Procedure 9.370(a), *amici* have conferred with the parties' counsel about their consent to *amici* filing the proposed brief. Respondent Garcia and Petitioner State of Florida both consent.

Respectfully submitted,
/s/ Jo Ann Palchak
Jo Ann Palchak
Florida Bar No. 22826
Vice-Chair, Amicus Committee
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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

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