IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, *Petitioner,*	)	No. SC20-1419
	)	DCA No. 5D19-590
v.	)	
JOHNATHAN DAVID GARCIA, *Respondent.*	)	

RESPONSE TO RESPONDENT'S MOTION TO STRIKE A PORTION OF PETITIONER'S REPLY BRIEF OR FOR LEAVE TO FILE A SUR-REPLY

Respondent has taken the remarkable step of moving to strike a sentence of the State's Reply Brief that, in Respondent's view, is not "accurate." Mot. 3. The motion should be denied.

Respondent asks the Court to strike the statement in the State's Reply Brief that the State "*did* 'offer[] . . . evidence'" of Respondent's ownership of the phone in the form of sworn affidavits. Reply Br. 20. Respondent, using what he sees as various "context[ual]" clues, strains to interpret the State's assertion as stating that those affidavits were offered "at the hearing on the State's motion to compel and were considered by the trial judge." Mot. 3. But the State was suggesting only, and accurately, that the State made those affidavits part of the record, *see* Reply Br. 19 (citing the affidavits)—a point that

Respondent does not (even in his latest motion) dispute,[1] and that the State also made in its Initial Brief. *See* Init. Br. 4, 56. In any event, to the extent there was any ambiguity in the State's assertion, the matter has now been clarified.

Respondent's motion appears largely premised on his mistaken view that the Court should disregard the affidavits in the record establishing that Respondent owns the phone in question simply because they were not introduced at the motion to suppress hearing. There is no basis for doing so, especially since the reason such evidence was not introduced at that hearing is because Respondent waited until these appellate proceedings to raise questions about whether the cell phone was his. In the trial court, by contrast, Respondent practically confessed that he knew the passcode, referring to it as "his password." App'x 24. The Fifth District, for its part, thought "there [wa]s no dispute" that Respondent owned the phone. *Id*. at 40 (second certified question).

[1] Respondent included the affidavits in his appendix in the Fifth District, thereby acknowledging that the affidavits are "portions of the record." Fla. R. App. P. 9.220(a).

Respondent also asks, in the alternative, for leave to file a "sur-reply addressing the issue of what kind of evidence can be considered to prove a foregone conclusion." Mot. 6. But Respondent already addressed this issue in his brief on the merits, and Respondent has now occupied the Court's time with an additional eight-page motion addressing related matters. The matter could be addressed further at oral argument if need be.

Should the Court wish to hear more from the parties on this matter in writing, the State respectfully requests an opportunity to respond to whatever Respondent submits.

CONCLUSION

The Court should deny the motion.

Dated: October 4, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal to the following on this **fourth** day of October 2021:

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