IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

JOHNATHAN DAVID GARCIA,

Petitioner,

v. Case No. 5D19-590

STATE OF FLORIDA,

Respondent.
_____/

Opinion filed August 28, 2020

Petition for Certiorari Review of Order from the Circuit Court for Orange County, Gail A. Adams, Judge.

Robert Wesley, Public Defender, and Robert Adams and Marie Taylor, Assistant Public Defenders, Orlando, for Petitioner.

Ashley Moody, Attorney General, Tallahassee, and Kaylee D. Tatman, Assistant Attorney General, Daytona Beach, for Respondent.

LAMBERT, J.

Johnathan David Garcia petitions this court for certiorari relief. He requests that we quash the trial court's order compelling him to provide to the State the passcode to his smartphone so that the State can unlock and thereafter search the phone pursuant to a search warrant that it had previously obtained from the court. Garcia argues that the

order violates his privilege under the Fifth Amendment of the United States Constitution not to be compelled to be a witness against himself in his pending criminal case.

BACKGROUND—

The alleged victims in this case are Garcia's former girlfriend, Ana Diaz, and Diaz's present boyfriend, Terrell Collins. Diaz was at Collins's home one evening when she heard a loud noise and immediately noticed that a bedroom window had shattered. Neither Diaz nor Collins saw who broke the window, but Diaz heard a vehicle leaving the area that she believed sounded similar to Garcia's vehicle.

Law enforcement was called to Collins's home. During a search of the perimeter of the residence, the officers found a black Samsung Galaxy Note 8 smartphone, approximately four to five feet from the broken window. Diaz identified the phone as belonging to Garcia and confirmed this fact for the investigating officers by calling Garcia's phone number. The Samsung phone in question began to ring, and Diaz's name and phone number were displayed on the phone screen. The phone was thereafter retained by law enforcement as potential evidence.

Approximately one month later, Diaz discovered that a GPS tracker had been placed on her vehicle that allowed her car to be tracked through a cell phone.

Garcia was eventually charged with throwing a deadly missile at, within, or into a building, two counts of aggravated stalking with a credible threat regarding his actions towards Diaz (count two) and Collins (count three), criminal mischief with damage of more than $200 pertaining to the broken window, and a separate count for criminal mischief for damage to Diaz's car tires that the officers had also discovered during their initial investigation. Subsequently to Garcia's arrest and the filing of the initial information, law

enforcement applied to the court for a search warrant to search Garcia's smartphone seized at the crime scene. The affidavit filed in support of the warrant asserted that there was probable cause that Garcia's phone contained evidentiary data regarding the aggravated stalking with credible threat charges, and sought "contact/phone lists, call logs, SMS (Simple Message Service, a/k/a text) messages, MMS messages, and/or graphic or video files and/or other relevant data which are stored within the phone device." A circuit judge issued the requested search warrant of Garcia's smartphone.

Because Garcia's smartphone was passcode protected, law enforcement was unable to unlock the phone to conduct the search. The State then moved to compel Garcia to provide the passcode, alleging in its motion that the contents of Garcia's phone "are relevant to how the events occurred and whether [Garcia] is guilty," and that providing the passcode would "involve no unreasonable intrusions upon the body of [Garcia]." The State represented to the court that Garcia objected to providing his passcode to unlock the phone.

The trial court held a very brief hearing on the State's motion to compel. Garcia was not personally present at the hearing; however, his counsel argued that under *G.A.Q.L. v. State*, 257 So. 3d 1058 (Fla. 4th DCA 2018), the disclosure of the passcode would be a "testimonial communication" and thus Garcia's Fifth Amendment privilege against self-incrimination would be violated by the compelled disclosure. The State countered that pursuant to the Second District Court's decision in *State v. Stahl*, 206 So. 3d 124 (Fla. 2d DCA 2016), the disclosure of Garcia's passcode would not violate the Fifth Amendment because, first, it was not a testimonial communication, and second,

even if it was testimonial, the "foregone conclusion" doctrine applied and would provide an exception to the Fifth Amendment privilege.

The trial court granted the State's motion. It orally found that providing the passcode was non-testimonial and thus, "the *Stahl* decision is controlling here."[1] The trial court directed Garcia "to turn over the passcode," but thereafter stayed its ruling pending our review.

JURISDICTION—

We first address our jurisdiction to review this order. To obtain certiorari relief, a petitioner must establish that the order entered constitutes a departure from the essential requirements of the law that results in material injury for the remainder of the case that cannot be corrected on postjudgment appeal. *G.A.Q.L.*, 257 So. 3d at 1060 (citing *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004)).

Here, Garcia invoked his privilege under the Fifth Amendment to preclude the disclosure of his passcode. The Fifth Amendment protects a person from being "compelled in any criminal case to be a witness against himself." Amend. V, U.S. Const. A witness is generally entitled to invoke his Fifth Amendment privilege against self-incrimination whenever there is a reasonable possibility that his answer to a question can be used in any way to convict him of a crime. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951).

[1] The court contemporaneously entered an unelaborated written order granting the State's motion.

The issue that we determine in this case is whether the Fifth Amendment protects a person from the compelled disclosure of a passcode to a passcode-protected smartphone. If it does, then the order in question compels Garcia to forfeit his Fifth Amendment privilege against self-incrimination. As certiorari lies in civil cases to review an order compelling discovery over an objection asserting that the order violates the Fifth Amendment, *Appel v. Bard*, 154 So. 3d 1227, 1228 (Fla. 4th DCA 2015) (quoting *Boyle v. Buck*, 858 So. 2d 391, 392 (Fla. 4th DCA 2003)), we similarly conclude that we have certiorari jurisdiction to review the instant order to compel. Notably, and as specifically asserted by the State in its motion, by Garcia essentially answering the question of what the passcode to his smartphone is, this would provide the State with information that would lead to a conclusion as to "whether [he] is guilty."

IS THE DISCLOSURE OF THE PASSCODE TESTIMONIAL UNDER THE FIFTH AMENDMENT?—

While the Fifth Amendment protects a person from being compelled in a criminal case to be a witness against himself, it "does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408 (1976). Although the passcode here, in and of itself, may not be incriminating, the Fifth Amendment's protection also encompasses compelled statements that lead to the discovery of incriminating evidence. *See United States v. Hubbell*, 530 U.S. 27, 37 (2000) ("It has, however, long been settled that [the Fifth Amendment's] protection encompasses compelled statements that lead to the discovery

of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.”).

The parties appear to concede that the information contained in Garcia’s phone will lead to incriminating evidence against him. As the order under review is “compelling” Garcia to provide the State with information, we must therefore determine whether providing a passcode to a smartphone constitutes a “testimonial communication.” If not, then there is no Fifth Amendment violation.

Initially, and to be clear, not all compelled productions of incriminating evidence are protected by the Fifth Amendment. For example, “acts like furnishing a blood sample, providing a voice exemplar, wearing an item of clothing, or standing in a line-up are not covered by this particular Fifth Amendment protection, for they do not require the suspect to ‘disclose any knowledge he might have’ or ‘speak his guilt.’” *G.A.Q.L.*, 257 So. 3d at 1061 (quoting *Doe v. United States*, 487 U.S. 201, 211 (1988)). For a communication to be “testimonial” and thus protected under the Fifth Amendment, “an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a ‘witness’ against himself.” *Doe*, 487 U.S. at 210 (footnote omitted). Garcia argues here that by compelling him to produce his passcode, the trial court is requiring that he “disclose the contents of his mind,” namely, his knowledge of the passcode, and as a result, he is being ordered to provide a testimonial communication in violation of the Self-Incrimination Clause of the Fifth Amendment. *See Doe*, 487 U.S. at 210–11 (recognizing that it is the “extortion of information from the accused,” the attempt to force a defendant “to disclose the contents

of his own mind," that implicates the Self-Incrimination Clause of the Fifth Amendment (internal citations omitted)).

The trial court here held that the providing of the passcode was non-testimonial, but it gave no explanation for its conclusion or ruling other than "the *Stahl* decision is controlling here." In *Stahl*, law enforcement obtained a warrant to search the defendant's locked phone, but the defendant refused to provide them with his passcode. 206 So. 3d at 128. The State filed a motion to compel production of the passcode, which the trial court denied, finding the production of the passcode to be testimonial. *Id.* The Second District Court quashed the order, holding that compelling the defendant to reveal his passcode was not testimonial because the passcode was "sought only for its content and the content has no other value or significance." *Id.* at 134.

We respectfully disagree with the Second District Court. Distilled to its essence, the revealing of the passcode is a verbal communication of the contents of one's mind. *Commonwealth v. Davis*, 220 A.3d 534, 548 (Pa. 2019) ("As a passcode is necessarily memorized, one cannot reveal a passcode without revealing the contents of one's mind."). We agree with Garcia that the order under review requires that he utilize the contents of his mind and disclose specific information regarding the passcode that will likely lead to incriminating information that the State will then use against him at trial. We therefore conclude that the compelled disclosure of his passcode is testimonial and is protected by the Fifth Amendment. This, however, does not end our analysis.

FOREGONE CONCLUSION DOCTRINE—

The State separately argues that even if the disclosure of a passcode is testimonial, the "foregone conclusion" exception to the Fifth Amendment applies and

supports the compelled disclosure or production of Garcia's passcode. Under this exception, an act of production does not violate the Fifth Amendment—even if it conveys a fact—if the State can demonstrate with reasonable particularity that, at the time it sought to compel the act of production, it already knew of the material sought, thereby making any testimonial aspect of the production a foregone conclusion. *G.A.Q.L.*, 257 So. 3d at 1063 (citing *In re Grand Jury Subpoena Duces Tecum Dated March 15, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012)).

The foregone conclusion exception emanates from the United States Supreme Court's decision in *Fisher*. In that case, two taxpayers were under investigation for possible civil or criminal liability under the federal income tax laws. *Fisher*, 425 U.S. at 393–94. They obtained from their accountants copies of certain documents used by the accountants in the preparation of their tax returns and then provided these documents to their attorneys to assist them in defending against the ongoing investigations. *Id.* at 394. The Internal Revenue Service attempted to compel the production of these financial documents through summonses served on the taxpayers' attorneys. *Id.* The attorneys refused to turn over the documents, asserting their clients' Fifth Amendment privilege against self-incrimination. *Id.* at 395.

The Court found against the taxpayers, holding that requiring the production of the accountants' documents in these cases involved no incriminating testimony within the protection of the Fifth Amendment. *Id.* at 414. Specifically, the Court reasoned that although compelling a taxpayer to comply with a subpoena to produce an accountant's work papers in the taxpayer's possession would undoubtedly involve substantial compulsion, the Fifth Amendment was not implicated because the subpoena "does not

compel oral testimony, nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought." *Id.* at 409. The Court then addressed the foregone conclusion doctrine:

> Surely the Government is in no way relying on the "truth-telling" of the taxpayer to prove the existence of or his access to the documents. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. The question is not of testimony but of surrender." *In re Harris*, 221 U.S. 274, 279, 31 S. Ct. 557, 558, 55 L.Ed. 2d 732, 735 (1911).

Id. at 411 (internal citation omitted).

To date, *Fisher* is the only United States Supreme Court decision to apply the foregone conclusion exception to compel testimony; however, contextually, it was applied to already known and existing business or financial documents, not to "compel oral testimony." *Id.* at 409. Judge Kuntz, in his concurring opinion in *G.A.Q.L.*, noted that, under *Fisher*, the foregone conclusion doctrine or exception was one of limited scope or application and was inapplicable to the compelled oral testimony of the defendant's passcode, such as the State is similarly seeking in the present case. 257 So. 3d at 1066 (Kuntz, J., concurring); s*ee also Eunjoo Seo v. State*, 148 N.E.3d 952, 962 (Ind. 2020) (declining to apply the foregone conclusion exception to compel the production of a passcode to a cellphone, explaining that "[n]ot only was the [foregone conclusion] exception crafted for a vastly different context, but extending it further would mean expanding a decades-old and narrowly defined legal exception to dynamically developing technology that was in its infancy just a decade ago" and that "it would also result in narrowing a constitutional right").

We agree with Judge Kuntz and conclude that it would be imprudent to extend the foregone conclusion exception beyond its application as described in *Fisher*. 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." *See Commonwealth v. Jones*, 117 N.E.3d 702, 724 (Mass. 2019) (Lenk, J., concurring). For example, other than in those limited circumstances when a defendant's ownership of the smartphone was in question, it would necessarily be a "foregone conclusion" that a defendant, as the owner of the passcode-protected phone, would have knowledge of or have otherwise memorized his or her passcode. To summarily compel the oral production of the passcode from a defendant in such circumstances would contravene the protections afforded under the Fifth Amendment. *See Davis*, 220 A.3d at 549 ("[T]o apply the foregone conclusion rationale in these circumstances would allow the exception to swallow the constitutional privilege.").

In summary, we hold that compelling a defendant, such as Garcia, to provide orally the passcode to his smartphone is a testimonial communication protected under the Fifth Amendment and that the foregone conclusion exception or doctrine does not apply to compelled oral testimony.[2] Accordingly, we grant Garcia's petition for writ of certiorari

[2] In its response to Garcia's petition, the State points out that in its motion to compel, it requested that Garcia be compelled to provide the passcode or, alternatively, his fingerprint to unlock his phone. The State asserts that irrespective of whether the oral production of the passcode violates the Fifth Amendment, compelling Garcia to place his finger on the phone to unlock it would not be protected. *See Stahl*, 206 So. 3d at 135 ("Compelling an individual to place his finger on the iPhone would not be a protected act; it would be an exhibition of a physical characteristic, the forced production of physical evidence, not unlike being compelled to provide a blood sample or provide a handwriting exemplar.").

and quash the trial court's order compelling him to provide his passcode to the State. We certify conflict with the Second District Court's decision in *Stahl* to the extent that *Stahl* holds that the oral disclosure of a passcode to a passcode-protected cell phone or smartphone is non-testimonial and therefore not protected under the Fifth Amendment.

Finally, we certify the following questions to the Florida Supreme Court as being of great public importance:

> 1. MAY A DEFENDANT BE COMPELLED TO DISCLOSE ORALLY THE MEMORIZED PASSCODE TO HIS OR HER SMARTPHONE OVER THE INVOCATION OF PRIVILEGE UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?
>
> 2. IF ORALLY PROVIDING THE PASSCODE TO A PASSCODE-PROTECTED SMARTPHONE IS A "TESTIMONIAL COMMUNICATION" PROTECTED UNDER THE FIFTH AMENDMENT, CAN THE DISCLOSURE OF THE PASSCODE NEVERTHELESS BE COMPELLED UNDER THE FOREGONE CONCLUSION EXCEPTION OR DOCTRINE WHEN THERE IS NO DISPUTE THAT THE DEFENDANT IS THE OWNER OF THE PASSCODE-PROTECTED PHONE?

PETITION GRANTED; ORDER QUASHED; CONFLICT CERTIFIED; QUESTIONS CERTIFIED.

HARRIS and GROSSHANS, JJ., concur.

We decline to address this argument. No evidence was presented at the hearing below to show that Garcia's smartphone could be unlocked by his fingerprint, nor did Garcia concede that his phone could be unlocked in this fashion.