

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

JACOB HAGER,

Petitioner,

v.

Case No. 5D20-1426

STATE OF FLORIDA,

Respondent.

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Opinion filed August 28, 2020

Petition for Certiorari Review of Order  
from the Circuit Court for Volusia County,  
Dawn D. Nichols, Judge.

James S. Purdy, Public Defender, and  
Nancy Ryan, Assistant Public Defender,  
Daytona Beach, for Petitioner.

Ashley Moody, Attorney General,  
Tallahassee, and Kristen L. Davenport,  
Assistant Attorney General, Daytona  
Beach, for Respondent.

PER CURIAM.

Jacob Hager petitions for a writ of certiorari challenging a trial court order that compels him to disclose his cell phone's passcode to the State. Hager argues that the order violates his Fifth Amendment privilege against self-incrimination. The State argues: (1) Hager will not suffer irreparable harm, meaning this court lacks certiorari jurisdiction; (2) compelling Hager to disclose his passcode is not testimonial; and (3) even if that

disclosure is testimonial, the “foregone conclusion” exception applies. See generally *State v. Stahl*, 206 So. 3d 124 (Fla. 2d DCA 2016) (articulating similar arguments).

For the reasons explained in this court’s opinion in *Garcia v. State*, No. 5D19-590 (Fla. 5th DCA Aug. 28, 2020), we reject the State’s arguments and grant the petition. See *G.A.Q.L. v. State*, 257 So. 3d 1058, 1065–66 (Fla. 4th DCA 2018) (Kuntz, J., concurring) (addressing foregone conclusion doctrine); *Appel v. Bard*, 154 So. 3d 1227, 1228 (Fla. 4th DCA 2015) (addressing certiorari jurisdiction, quoting *Boyle v. Buck*, 858 So. 2d 391, 392 (Fla. 4th DCA 2003)); *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.”).

Moreover, as we did in *Garcia*, we again certify conflict with the second district’s decision in *Stahl* to the extent *Stahl* holds 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. We also certify, as being of great public importance, the same two questions certified in *Garcia*:

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.

COHEN, EISNAUGLE, and SASSO, JJ., concur.