IN THE SUPREME COURT OF FLORIDA

CASE NO. SC20-1419

L.T. DCA CASE NO. 5D19-590

THE STATE OF FLORIDA,

Petitioner,

-vs.-

JONATHAN DAVID GARCIA,

Respondent.

BRIEF OF AMICUS CURIAE INDEPENDENCE INSTITUTE AND DUE PROCESS INSTITUTE IN SUPPORT OF RESPONDENT JONATHAN DAVID GARCIA

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INTRODUCTION

This amicus brief is filed in support of JONATHAN DAVID GARCIA. The State of Florida is appealing the decision by the Fifth District Court of Appeal holding that the forced disclosure of the passcode to a cellular phone to assist in a criminal investigation violates the accused's right against self-incrimination. References to the record are designated as:

(R) = Record on Appeal (including the Transcript of Proceedings)

STATEMENT OF INTEREST

This amicus brief is sponsored by two organizations: the Independence Institute and the Due Process Institute.

The Independence Institute is a non-profit Colorado corporation founded in 1985 to further the fundamental precepts of the Declaration of Independence. It is the second-oldest state-level think tank in the United States.

The Institute has participated in many constitutional cases, and its amicus briefs in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010) were cited in the opinions of Justices Alito, Breyer, and Stevens (under the name of lead amicus

ILEETA, International Law Enforcement Educators and Trainers Association).

The Institute's Research Director, David B. Kopel, has been cited in 21 state appellate opinions and 17 federal circuit opinions. He is an adjunct professor of constitutional law at University of Denver, Sturm College of Law.

The Institute's Senior Fellow in Constitutional Jurisprudence, Robert G. Natelson, is Professor of Law (ret.) at the University of Montana. His scholarship on constitutional issues has been relied on by justices of the U.S. Supreme Court in six cases, and by Justice (then Judge) Gorsuch in *Kerr v. Hickenlooper*, 754 F.3d 1156, 1195 (10th Cir. 2014) (Gorsuch, J., dissenting).

The Due Process Institute is a bipartisan, nonprofit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Institute has participated as an amicus curiae before the Supreme Court of the United States, as well as federal circuit courts of appeal, in cases presenting important criminal justice issues, including *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019); and *United States v. Haymond*, 139 S. Ct. 2369 (2019).

The issues raised in this brief are essential to protecting principles of due process and fundamental fairness in America's criminal justice system.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal correctly held that compelling a suspect in a criminal investigation to disclose the passcode to his cell phone, for the express purpose of revealing potentially incriminating evidence, violates the Fifth Amendment to the United States Constitution. It also violates the due process and privacy provisions of the Florida Constitution and those concerns may be raised at any time.

State and federal law hold that where the disclosure is testimonial, it is constitutionally protected. Actions that, while arguably not themselves testimonial, serve as a link in the direct chain of testimonial and incriminating evidence also assume constitutional protection.

Password protection, by its very nature, evinces an intent to keep matters private. And whether this is analyzed under the United States Constitution or the (independent) Florida Constitution, and in accordance with self-incrimination, due process, and privacy provisions, this is an important issue that affects a wide range of contexts in this ever-expanding technological world.

ARGUMENT

The significance of this case extends far beyond simply requesting a series of numbers, letters, and typographical symbols (passcode). It requires the Court to determine 1) the general nature of testimonial evidence and whether the compelled disclosure of a passcode constitutes testimonial evidence -- particularly where the accused knows that the passcode will be used to search the phone in an effort to discover incriminating evidence against him; 2) whether by giving police the passcode, the accused admits -- explicitly or implicitly -- that he was present at the scene of the offense, thereby shifting part of the burden of proof onto him; and 3) whether the protection against self-incrimination implicates the Florida Constituition's independent privacy provision.

To raise a Fifth Amendment claim, the accused must assert three things: he is compelled to disclose testimonial evidence that is incriminating. *Fisher v. United States*, 425 U.S. 391, 410 (1976). There is no dispute from this record that the state sought to compel the discosure and that the Respondent refused to comply. And, as acknowledged in the state's merits brief to this Court, the police are interested in the passcode because it provides access to what they

believe will contain incriminating evidence. The issue before this Court is whether or not the disclosure of the passcode is testimonial.

1. Simplifying the characterization of testimonial evidence, generally, and with particular reference to digital passcodes.

The United States Supreme Court has held on numerous occasions that testimonial evidence is that which asserts a fact -- whether the assertion is made verbally or through the production of evidence. The person is consciously and actively attesting to something that, in this case, is potentially incriminating. By doing so, he is becoming a witness against himself. *Doe v. United States*, 487 U.S. 210, 210 (1988); *United States v. Hubbell*, 530 U.S. 27, 48-52 (2000) (Thomas, concurring) (and cases cited therein).

Historically, courts have placed disclosure evidence into one of two categories: purely physical or purely cognitive evidence. Physical evidence -- like blood samples, fingerprints, voice and handwriting exemplars, and physical features such as those seen in a line-up -- are considered purely physical and are most often used for identification. Because they do not rely on the use of one's mind to communicate information, they are not considered to be testimonial. *See Schmerber v.*

California, 384 U.S. 757, 764 (1966); *see also Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967). [1]

"[I]n order to be testimonial, 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 v. United States*, 487 U.S. 201, 210 (1988). S*ee also In Re Grand Jury Subpoena Duces Tecum*, 670 F.3d 1335, 1345 (11th Cir. 2012) ("the Fifth Amendment privilege is not triggered where the Government merely compels some physical act, i.e., where the individual is not called upon to make use of the contents of his or her mind").[2]

Gradually, courts began to recognize a third category of evidence: hybrid physical and cognitive evidence. Physical or physiological evidence that involves the use of mental processes to convey information about the accused, such as the results of lie detector or brain-mapping

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[1] *See also Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) holding that the manner of the defendant's speech (slurred) was purely physical, not testimonial.

[2] In this regard, the Supreme Court recognized that, for Fifth Amendment purposes, there is a difference between compelled submission (submitting to the withdrawal of blood) and compelled assistance (disclosing documents and other testimonial evidence that assists police in their investigation). *See, e.g., United States v. Hubbell*, 530 U.S. 27, 34 (2000).

tests, are examples of hybrid evidence and are protected by the Fifth Amendment. *See Councelman v. Hitchcock*, 142 U.S. 547, 562 (1892); *see also Schmerber*, 384 U.S. at 764; *Braswell v. United States*, 487 U.S. 99, 126 (1988) (Kennedy, J., dissenting). [3]

Indeed, the Court in *Fisher*, 425 U.S. at 412, noted that whether evidence is testimonial or not "may depend on the facts and circumstances of particular cases or classes thereof."

So, for example, if I ask you to raise your right arm if you were present at the crime scene and your left arm if you were not there, the choice of which arm to raise is generally considered mental or cognitive (ergo, testimonial) but the actual arm raising is purely physical (not

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[3]

> Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

testimonial). Often, it depends on what question is asked and what the answer reveals.[4]

In this case, police found a cell phone at the crime scene; the victim identified it as the Respondent's and dialed his number, causing the phone to ring. Police confronted Mr. Garcia and told him that once they get the passcode, they will open the phone and search its contents. Under these facts, revealing the passcode will do two things -- both of which are testimonial. First, it tells police that Mr. Garcia owns and possesses the phone and that he knows the passcode. Second, since the phone was found at the crime scene, he was likely there that night.

Disclosing the passcode not only communicates this to the jury but shifts the burden of proof onto the defense to, essentially, disprove this element of the prosecution's case. Mr. Garcia must now convince the jury either that he left it there at some other time or that someone else had his

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[4] One wonders whether, in *Rhode Island v. Innis*, 446 U.S. 291 (1980), the defendant's statements directing police to the location of the hidden rifle was even testimonial. Police in that case were investigating a murder and following his arrest, Innis invoked his *Miranda* rights. Rather than ask him direct questions, police threw out the possibility that unless they recover the murder weapon, children could find it and harm themselves. Without confessing to the murder or admitting that he hid the rifle, Innis directed police to its location. The directions merely gave police access to the murder weapon, which later could be tied to Innis. Were his directions testimonial?

phone and dropped it on the victim's lawn that night. [5] Either way, contrary to the state's description, this is not simply a physical act of disclosing letters, numbers, and typographical symbols; it is, in actuality, an act of communication -- a testimonial act.

But there is another way to conceptualize passcode evidence. Instead of categorizing it as physical, mental, or hybrid, we should look at it as a link in the chain of testimonial evidence. Just like the chain of incriminating evidence, testimonial evidence can also be a chain. And while the links may not, in and of themselves, be testimonial or incriminating, where they directly lead to the discovery of testimonial or incriminating evidence, they assume Fifth Amendment characteristics and protection. As the Supreme Court explained:

> The privilege afforded not only extends to answers that would support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute. . . . [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would

[5] If a suspect were to deny being present at the scene of the crime while also telling police that only he has had possession of the phone, and that only he knows the passcode to unlock it, an untruthful statement can expose him to perjury charges. *See generally Fisher v. E.F. Hutton & Co., Inc.*, 463 So. 2d 289, 290 (Fla. 2nd DCA 1984). His answers are most definitely testimonial. "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." *Rhode Island v. Innis*, 446 U.S. 291, 301 n. 5 (1980).

> be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Hoffman v. United States, 341 U.S. 479, 486-87 (1951); *see also Maness v. Meyers*, 419 U.S. 449, 461 (1975); *Blau v. United* States, 340 U.S. 159, 161 (1950); *Mason v. United States*, 244 U.S. 362, 366 (1917); *Malloy v. Hogan*, 378 U.S. 1, 35 (1964) (White, J., dissenting):

> Answers which would furnish a lead to other evidence needed to prosecute or convict a claimant of a crime -- clue evidence -- cannot be compelled, but "this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer" [quoting *Hoffman*, 341 U.S. at 486].[6]

This is certainly the case here. Police informed Mr. Garcia that they obtained a search warrant to search the contents of the phone and that they needed the passcode to unlock it. The passcode gives police access to potentially incriminating evidence. It is, in a word, the first link

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[6] The self-incrimination link was cited as far back as 1807, during the trial of Aaron Burr for treason. Burr's secretary was circuitously asked about the cipher key (legend) to unlock the encryption code Burr used in his letters to others about the charged incident. His secretary refused to provide the code saying "though that question may be an innocent one, yet counsel for the prosecution might go on gradually, from one question to another, until he at last obtained matter enough to incriminate him." Kerr, Orin S., "Decryption Originalism: The Lessons Learned of Burr," 134 Harvard L.Rev. 905, 923 (2001).

to the discovery of potentially incriminating testimonial evidence and it is entitled to Fifth Amendment protection.[7]

Florida cases describe testimonial evidence in a manner consistent with the categories used by the United States Supreme Court. The merits briefs filed in this case discuss the Florida cases in detail. While the general definition of testimonial and incrimination remains the same throughout these cases, the characterization of "passcodes" differs considerably. For instance, in *State v. Stahl*, 206 So. 3d 124 (Fla. 2nd DCA 2016), the Second District Court of Appeal held that disclosing a passcode is not testimonial (rather, it is a "nonfactual statement" that does not depend on whether it leads police to incriminating evidence), 206 So. 3d at 134,[8] while the Fourth District Court of Appeal in *G.A.Q.L. v. State*, 257 So. 3d 1058, 1061 (Fla. 4th DCA 2018) held that providing your passcode is a testimonial act that necessarily uses the contents of your mind.

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[7] *See also Wahnon v. Coral & Stones Unlimited Corp.*, ---- So. 3d ---, 2020 WL 7049998 (Fla. 3rd DCA Dec. 20, 2020) (chain of incriminating evidence stemming from answers to deposition or interrogation questions).

[8] Interestingly, the *Stahl* court held that compelling someone to open his phone by placing his finger on it is not a protected act any more than compelling him to submit to a blood test or handwriting exemplar. 206 So. 3d at 135.

In addition to the characterization given to passcode disclosures, courts differ on whether revealing the passcode qualifies under the foregone conclusion exception to compelled disclosure of testimonial evidence.

This exception came exclusively from *Fisher v. United States*, 425 U.S. 391 (1976), and stands for the proposition that, essentially, even if your testimony would otherwise be protected by the Fifth Amendment, where it adds very little to the prosecution's case, it lacks the incriminating aspect necessary for a Fifth Amendment violation to occur.[9]

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[9] In *Fisher*, the IRS was seeking documents to show that two taxpayers (Mr. and Mrs. Goldsmith) had fraudulently filed their tax returns. They needed access to those documents, as well as a summary of the documents prepared by their accountant. The taxpayers gave these documents to their attorney (Solomon Fisher) to hold. Neither the taxpayers nor their attorney would grant the IRS access to them. The Supreme Court wrote: "It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment." 425 U.S. at 412. The Court also said: "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," 425 U.S. at 412.

The quoted sentences were dicta. The issue before the Court -- and the holding of the Court -- was that the invocation of Fifth Amendment protection is personal and cannot be asserted by a third party. In *Fisher*, the Fifth Amendment was invoked by the taxpayers' attorney and not by the taxpayers. The decision began with Justice White reciting that specific issue and ended with that specific holding. 425 U.S. at 393, 414.

Still, Florida courts are divided on the testimonial and the incriminating aspects of the disclosure of passcodes. *Compare Aguila v. Frederic*, 306 So. 3d 1166 (Fla. 3d DCA 2020) (compelled disclosure of passcode is testimonial) with *Stahl* (such disclosure is not testimonial), *Varn v.* State, --- So. 3d ---, 2020 5244807 (Fla. 1st DCA Sept. 30, 2020) and *Pollard v. State*, 287 So. 3d 649 (Fla. 1st DCA 2019), *rev. dismissed*, 2020 WL 1491793 (Fla. Mar. 25, 2020) (whether or not disclosure of the passcode is testimonial, it is permissible under the foregone conclusion doctrine).

Along the way, the Court discussed the principle of foregone conclusion, a discussion that has been repeated in cases such as *Stahl* and *G.A.Q.L* (cited above). Neither issue was raised by the parties in *Fisher*, making the foregone conclusion holding non-binding dicta under federal law and absolutely non-binding under state constitutional law. *See Pedroza v. State*, 291 So. 3d 541, 547 (Fla. 2020) ("Any statement of law in a judicial opinion that is not a holding is dictum. State v. Yule, 905 So. 2d 251, 259 n. 10 (Fla. 2d DCA 2005) (Canady, J., specially concurring)"); *Sims v. State*, 743 So. 2d 97, 99 (Fla. 1st DCA 1999) (While dicta from the Florida Supreme Court may afford some guidance . . . such passages lack binding force of precedent"); *see also White v. Woodall*, 572 U.S. 415, 429 (2014) (Breyer, J., dissenting). An informative critical analysis of the foregone conclusion doctrine can be found in the recent article Raila Cinda Brejt, "Abridging the Fifth Amendment: Compelled Decryption, Passwords, & Biometrics," 31 Fordham Intell. Prop. Media & Ent. L.J. 1153 (2021).

It should be noted that Justice Thomas has expressed interest in reconsidering the *Fisher* decision. *Hubbell*, 530 U.S. at 56.

2. The Florida Constitution provides an alternative way of resolving the passcode disclosure problem.

This Court has long recognized that the Florida Constitution may provide defendants with more rights than those provided by the United States Constitution. Two provisions that are particulary relevant to the compelled disclosure of digital passcodes are Florida's privilege against self-incrimination and right to privacy.

Article 1, Section 9 (privilege against self-incrimination)

Article I, section 9 of the Florida Constitution provides in pertinent part that "[n]o person shall . . . be compelled in any criminal matter to be a witness against oneself." This Court has repeatedly interpreted it to give more protection than that afforded by the federal constitution.

For example, while the federal constitution does not prohibit using the defendant's pre-*Miranda* silence for impeachment purposes, Article I, § 9 of the Florida Constitution does. *State v. Hoggins*, 718 So. 2d 761 (Fla. 1988).

This was reaffirmed in *State v. Horowitz*, 191 So. 3d 429 (Fla. 2016), wherein this Court held that while the Fifth Amendment does not prohibit the introduction of pre-arrest, pre-*Miranda* statements as substantive evidence of guilt, the Florida Constitution does.

> Unless the Florida Constitution specifies otherwise, this Court, as the ultimate arbiter of the meaning and extent of the safeguards and fundamental rights provided by the Florida Constitution, may interpret those rights as providing greater protections than those in the United States Constitution. Put simply, the United States Constitution generally sets the "floor" -- not the "ceiling" -- of personal rights and freedoms that must be afforded a defendant by Florida law.
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> . . .
>
> As this Court held in *Traylor*, the privilege against self-incrimination, as one of our Constitution's fundamental rights, must be -- and has long been -- broadly construed. Indeed, as this Court has since reemphasized, the privilege against self-incrimination provided in the Florida Constitution offers *more* protection than the right provided by the Fifth Amendment to the United States Constitution.

191 So. 3d at 438-39 (citations and footnote omitted) (emphasis original).[10] *See also Myers v. State*, 211 So. 3d 962, 970 (Fla. 2017); *Warner v. City of Boca Raton,* 887 So. 2d 1023, 1030 (Fla. 2004) ("In interpreting the scope of constitutional rights, this Court has stated that in any state issue, the federal constitution represents the 'floor' for basic freedoms, and the state constitution represents the 'ceiling'"); *Armstrong v. Harris*, 773 So. 2d 7, 17 (Fla. 2000).

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[10] When the reach of Florida constitutional provision is intended to go no further than that provided in the United States Constitution, the text of our constitution expressly says so. *E.g.*, Art. I, § 17 (conformity clause for excessive punishment) and Art. I, § 12 (search and seizure law).

Article I, section 23 (right to privacy)

The Florida Constitution textually and explicitly guarantees the right to privacy whereas the United States Constitution does not.[11] This reflects a commitment to protecting privacy that is special to this state. And passcodes, after all, exist to keep information stored on the cell phone or other digital devices private.

The Supreme Court in *Fisher* acknowledged that privacy is at the heart of the privilege against self-incrimination. 425 U.S. at 399.

> It is true that the Court has often stated that one of the several purposes served by the constitutional privilege against compelled self-incrimination is that of protecting personal privacy.

See also Justice Brennan's concurrence in *Fisher*, 425 U.S. at 415-16 ("The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment," quoting *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)). *See generally* A.A. Bailey, "Privacy, Privilege, and

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[11] Article I, section 23 provides: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

Protection: A Case for Fifth Amendment Expansion," 29 U.Fla.J.L. & Pub. Pol'y 167 (2019).

The above provisions -- both of which afford greater protection than that afforded by the federal constitution -- should be considered in light of two over-riding constitutional principles: first, it has long been recognized that a fundamental constitutional challenge may be raised at any time, *see, e.g., Parker v. Town of Callan*, 115 Fla. 266, 156 So. 334 (1933); *Johnson v. State*, 460 So. 2d 954 (Fla. 1st DCA 1984), *approved*, 483 So. 2d 420 (Fla. 1986), and second, that the decision clearly states that it is based on independent state grounds (i.e., the Florida Constitution). *See Florida v. Powell*, 559 U.S.50, 56 (2010); *Pennsylvania v. Muniz*, 496 U.S. 582, 589, n. 4 (1990).

In his dissent in *United States v. Dionisio*, 410 U.S. 19 (1973), Justice Marshall explained why eroding Fifth Amendment protections is so troubling. Perhaps the most significant takeaway from that dissent, as well as from the concerns raised by other Justices,[12] is that the protections against self-incrimination must not be weakened by distinctions without a difference. There is something fundamentally wrong

[12] *See, e.g., Braswell v. United States*, 487 U.S. 99, 126 (Justices Kennedy, Brennan, Marshall, and Scalia dissenting).

with forcing a suspect to become a member of the prosecutorial team against him.

CONCLUSION

Based on the arguments and authorities herein, and in support of the Respondent's arguments, the undersigned urges that the decision of the Fifth District Court of Appeal be affirmed.

Respectfully submitted,

Harvey J. Sepler
HARVEY J. SEPLER

CERTIFICATE OF FONT SIZE

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Arial font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Clerk of Court using the Florida Courts E-Filing Portal and served via E-Service to counsel of record, on this 10th day, of May, 2021.

Harvey J. Sepler
HARVEY J. SEPLER

CERTIFICATE OF FORMATTING COMPLAINCE

Undersigned counsel certifies that this brief complies with the requirements prescribed in Florida Rule of Appellate Procedure 9.045.