SC20-1419

In the Supreme Court of Florida

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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

For centuries, search warrants have allowed law enforcement access to the proof and instrumentalities of crime. Yet Respondent contends that the State cannot require him to provide his passcode to execute a search warrant of his cellular phone. If accepted, that would disable the government from combating an endless string of digital crimes—as well as brick-and-mortar crimes aided or recorded by technology—crippling the State's ability to prosecute child pornographers and cyber fraudsters.

The Fifth Amendment privilege against self-incrimination does not require that result. It is settled that a suspect may be compelled to "open his doors to the officers of the law" executing a warrant—even of a home. *See Payton v. New York*, 445 U.S. 573, 602–03 (1980). Requiring Respondent to provide the digital key to his phone, no less than a physical key, does not require him to testify against himself. It merely requires him to provide the kind of access long available to investigators.

Regardless, the trial court's order causes Respondent no irreparable harm, as required for certiorari jurisdiction: If he is convicted at trial based on compelled testimony, Respondent can

obtain a reversal of that conviction on appeal.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION TO GRANT CERTIORARI BECAUSE RESPONDENT HAS NOT SUFFERED IRREPARABLE HARM.

The district court lacked subject-matter jurisdiction to issue a writ of certiorari quashing the order compelling production of Respondent's cell-phone passcode, because Respondent has not been injured and because any asserted injury can be remedied on direct appeal. Init. Br. 15–21.

A. Respondent first argues that the State "waived its jurisdictional argument." Ans. Br. 18. "Subject-matter jurisdiction," however, is "never . . . waivable." *Page v. Deutsche Bank Tr. Co. Ams.*, 308 So. 3d 953, 960 (Fla. 2020). Respondent relies on cases holding that "[s]tanding is a waivable defense." Ans. Br. 18. But this Court has said that standing does not go to subject-matter jurisdiction. *Page*, 308 So. 3d at 960–61. Without irreparable harm, by contrast, an appellate court lacks "jurisdiction to entertain petitions for certiorari." *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 355 (Fla. 2012). And because jurisdiction is a threshold inquiry, the Court must decide the irreparable-harm issue even if it

is "beyond the scope of the certified questions and the certified conflict." Ans. Br. 19.

B. 1. Respondent suffered no Fifth Amendment injury when he was compelled, pretrial, to provide his passcode. Injury would occur only if compelled statements were used at trial to convict him. Init. Br. 15–19.

Respondent's counterarguments (Ans. Br. 25–35) fail as a matter of precedent, text, and history.

Case law. The "core protection" of the Self-Incrimination Clause is the "prohibition on compelling a criminal defendant to testify against himself at trial." *United States v. Patane*, 542 U.S. 630, 637 (2004) (plurality op.). Though Respondent dismisses that and other statements by the Supreme Court either as dicta or appearing merely in plurality opinions, Ans. Br. 26, he fails to cite any Supreme Court precedent suggesting that Fifth Amendment injury can occur before trial.

The Self-Incrimination Clause "only protects against the actual 'infliction of criminal penalties on the witness'—a criminal conviction—based on self-incriminating testimony." *United States v.*

Gecas, 120 F.3d 1419, 1428 (11th Cir. 1997) (en banc). The "conviction of an offense revealed through compelled testimony" is the "only harm against which the Self–Incrimination Clause protects." *Id.* at 1429 (emphasis omitted).

That comports with *Kastigar v. United States*' holding that a State may compel a person to speak if immunity is granted. *See* 406 U.S. 441, 443–48 (1972). Mere compulsion pretrial thus cannot be Fifth Amendment injury—*Kastigar* shows that it is the *use* of a compelled statement to convict at trial that constitutes the injury.

Respondent confuses the violation of a prophylactic rule with the occurrence of constitutional injury. Ans. Br. 34–35. There are "two ways" to "prevent the occurrence of [Fifth Amendment] harm." *Gecas*, 120 F.3d at 1428. "First and most basically, courts presiding over a criminal trial must exclude from evidence compelled, testimonial self-incrimination and its fruits." *Id.* "Second, courts can prevent the infliction of criminal penalties based on compelled, testimonial self-incrimination by refusing to force witnesses to testify against their own penal interest." *Id.* at 1429. That second rule—which Respondent invokes here—is merely "prophylactic." *Id.* It

ensures that prosecutors cannot convict a person with compelled statements that were never uttered. *Id.* Violating the rule does not itself cause Fifth Amendment injury.

Indeed, the second rule must be prophylactic because despite the Clause's textual limitation to "criminal case[s]," U.S. Const., amend. V, it can be invoked even in civil cases, *see, e.g., State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 490 (1973). Like *Miranda* rights, pretrial invocation of the privilege is an additional protection against the harm at the core of the right. *See Oregon v. Elstad*, 470 U.S. 298, 305 (1985).

Text. Respondent contends that the text of the Fifth Amendment supports application of the Self-Incrimination Clause to pretrial proceedings. He says, first, that "[t]he Clause speaks of a 'person,' not just the criminally accused," whereas the Sixth Amendment "refers to 'the accused,' a narrower class of people facing criminal prosecution." Ans. Br. 26. He also says that the Framers "used the narrower term 'trial' in the Sixth Amendment's 'speedy and public trial' clause" but used the phrase "'[criminal] case'" in the Self-Incrimination Clause, suggesting the latter offers broader

protections. Ans. Br. 27. Respondent overlooks that what the Clause guards against is a "person" in a "criminal case" being compelled to be a "*witness* against himself," which reflects a focus on what happens at trial. A "witness" is one who testifies at trial, not merely one who assists law enforcement in an investigation. *See* Init. Br. 18. That is why a defendant has no Sixth Amendment right to confront witnesses during police interviews or probable-cause hearings.

History. Respondent also argues that the privilege against self-incrimination cannot exclusively be a trial right because, at the Framing, criminal defendants were incompetent to testify at trial. Ans. Br. 28–29. The Clause, he reasons, must therefore have prevented even pretrial compulsion.

Early American history refutes this theory. First, "[t]he colonists viewed the privilege against self-incrimination as a bulwark against arbitrary and intrusive criminal investigations similar to those experienced by their ancestors under the Star Chamber." *Gecas*, 120 F.3d at 1457. The Star Chamber was a prerogative court of the British monarchy that compelled defendants to respond to the allegations under penalty of fine, then imposed criminal penalties

based on those coerced statements. *Id.* at 1446–47. It loomed in early-American public discourse, *see, e.g.*, Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 419 (1999), and it was not unreasonable to constitutionalize a trial-centric privilege barring similar practices even if that privilege overlapped in some ways with contemporaneous evidence rules.

Second, the incompetency rule did not apply in all instances and in all Framing-era courts. For example, "[s]tatements by the accused could be read into evidence at trial" in common-law courts. *Gecas*, 120 F.3d at 1452.

The incompetency rule was outright inapplicable in other courts of the day. Ecclesiastical tribunals frequently "interrogate[d] suspects in criminal proceedings, provided that they did not do so under oath." *Id.* at 1450; *see also id.* at 1453. The Court of Vice Admiralty likewise "adhered to a system of procedure similar to that of the Star Chamber," *id.* at 1454, and "[t]he encroachments of the admiralty were among the grievances of our revolutionary fathers." *New England Mut. Marine Ins. Co. v. Dunham*, 78 U.S. 1, 17 (1870). Indeed, the British established several admiralty courts in Nova Scotia and

the American colonies shortly before the Revolutionary War. Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 Am. J. Leg. Hist. 35, 79 (2005). Complaints about those courts "permeated revolutionary rhetoric and became embedded in its ideology." *Id.*

A trial-centric constitutional privilege responded to these Framing-era concerns.

2. Even assuming some injury, Respondent offers no response to the State's argument that any injury from compelled disclosure is remediable on appeal. *See* Init. Br. 19–21.

Whether an injury is irreparable should be a case-by-case inquiry into the nature of the alleged injury. *See Adkins v. Sotolongo*, 227 So. 3d 717, 722 (Fla. 3d DCA 2017) (Luck, J., concurring). Here, Respondent's asserted harm is that he might be *convicted* based on compelled statements. *See* Ans. Br. 47; *see also id.* at 43–45 (admitting that the State could compel his cell-phone passcode if it afforded him immunity from prosecution); *Kastigar*, 406 U.S. at 451–52. But that asserted injury could easily be remedied on direct appeal by reversing his conviction.

Respondent has thus asserted no injury distinct from any defendant whose constitutional rights have been violated, including by violations of the rights to confrontation, due process, and a jury, which are remediable on appeal. Defendants cannot seek certiorari to correct every such error, an approach that would circumvent the rule that criminal defendants have no right to interlocutory appeal. *Lopez v. State*, 638 So. 2d 931, 932 (Fla. 1994).

II. THE SELF-INCRIMINATION CLAUSE DOES NOT PROTECT RESPONDENT FROM PROVIDING ACCESS TO HIS PHONE.

As a matter of original meaning, this case involves no compelled testimony. Even if it does, the foregone-conclusion doctrine applies because the government already knows the information conveyed by Respondent's act of producing the passcode.

A. Disclosing a passcode is not testimonial.

Armed with a warrant, police may "require [a suspect] to open his doors." *Payton v. New York*, 445 U.S. 573, 602–03 (1980). That act does not implicate Fifth Amendment protections; even if door-opening communicates the suspect's possessory interest in the home, that does not render it testimonial.

1. Respondent's principal reply is that "[t]he vast majority of

verbal statements . . . will be testimonial," and that Respondent has been asked to write something down—a verbal statement. Ans. Br. 35 (quoting *Doe v. United States*, 487 U.S. 201, 213 (1988) (*Doe II*)). But even verbal statements are non-testimonial in certain "instances." *Doe II*, 487 U.S. at 213–14. "[W]hether a compelled communication is testimonial . . . depends on the facts and circumstances of the particular case." *Id.* at 214–15.

One consideration is whether a verbal act—like signing a consent form, *id.* at 219—is sought solely as a means of access. *See id.* at 215 ("Although the executed form allows the Government access to a potential source of evidence, the directive itself does not point the Government toward hidden accounts or otherwise provide information that will assist the prosecution in uncovering evidence."). The State does not seek the passcode because it is testimony that will help secure a conviction. Respondent has not averred, for example, that the passcode's content is anything more than a series of letters and numbers lacking communicative value. Prosecutors likewise do not wish to introduce at trial Respondent's act of producing the passcode. The State instead seeks the passcode to execute the

warrant. Revealing it therefore does not make Respondent "a witness against himself," U.S. Const., amend. V, at least not in any meaningful sense.

History reflects a more limited conception of the Clause. The Fifth Amendment was a reaction to Framing-era inquisitorial methods of obtaining a conviction, like ecclesiastical courts compelling religious dissenters to reveal their religious beliefs under oath, with punishments imposed for those forced confessions of conscience. *See Gecas*, 120 F.3d at 1442, 1446–49; John H. Langbein, *The Origins of Adversary Criminal Trial* 277–78 (2003). The Clause had nothing to do with searches and seizures.

The Fourth Amendment and its history further show that the Constitution does not give individuals a right to subvert a warrant by denying access to law enforcement. In that regard, the Collection Act of 1789 is considered "nothing less than a statutory exegesis on the Fourth Amendment" because it "identified the techniques of search and seizure that the [F]ramers of the amendment believed reasonable while they were framing it." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 737–39 (2009). Section 24

of the Act authorized customs officers to obtain "a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods." The Collection Act of July 31, 1789, § 24, 1 Stat. 43. Critically, a person had no right to "forcibly resist, prevent, or impede" that search, and doing so was punishable by a fine. *Id.* § 27.

In other words, no person could nullify a valid warrant by refusing entry; when confronted with a warrant, that individual was required to step aside. So it stands to reason that a person could be forced to unlock an impenetrable door he had placed in law enforcement's way.

Modern jurisprudence presumes as much. If adopted, Respondent's position would undermine the crucial assumption of the Supreme Court's decision in *Riley v. California*, 573 U.S. 373 (2014). There, the Court held that "[o]ur answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." *Id.* at 403. That assumed that a warrant would grant police access.

2. Respondent suggests that the State's concerns are overblown

because it has technology allowing it to bypass cell-phone encryption. *See* Ans. Br. 8–9. Setting aside that such technology was unavailable or ineffective here, *see* App'x 22, encryption is an "arms race" and, over time, "the mathematics overwhelmingly favors encryption." Orin S. Kerr & Bruce Schneier, *Encryption Workarounds*, 106 Geo. L.J. 989, 994 (2018).

Publicly available information confirms that warrant-proof encryption is a problem. In 2018, the FBI estimated that it had over a thousand encrypted smartphones that it could not access. Alan Z. Rozenshtein, *Wicked Crypto*, 9 U.C. Irvine L. Rev. 1181, 1187 (2019). More recently, FBI Director Wray testified to Congress that "[i]ncreasingly, commercial device manufacturers have employed encryption in such a manner that only the device users can access the content of the devices," and that "[t]he problems caused by law enforcement agencies' inability to access electronic evidence continue to grow." Statement of Christopher A. Wray, U.S. Senate Comm. on the Judiciary, at 5 (Mar. 2, 2021), tinyurl.com/5em3xyva.

3. Respondent's claims of testimony are driven by his fear that prosecutors could "present" at trial his "act of unlocking the phone"

as evidence that the phone was his. Ans. Br. 47. Yet prosecutors have never announced an intention to do so, and whether they could do so could be litigated at trial. And even if the act of production has some incidental testimonial aspects, this Court could require suppression of the use (but, importantly, not the derivative use) of the act of production under Section 914.04. *See* Init. Br. 49–50 n.25. Respondent's fear thus provides no basis for denying production.

B. Alternatively, compelling the passcode is permitted by the foregone-conclusion doctrine.

The foregone-conclusion doctrine applies because the State already knows everything Respondent's act of production might convey: the passcode's existence, Respondent's knowledge of it, and its authenticity. Init. Br. 33–58. Any incidental information that act might convey is therefore unprotected.

1. At the gate, the ACLU argues that the foregone-conclusion doctrine "applies only to the production of specified, preexisting business records." ACLU Br. 13–19. But other than the fact that *Fisher*, *Hubbell*, and *Doe I* involved subpoenas for business records, the ACLU offers no reason why business records are so unique that they deserve a special constitutional rule. The question remains

whether the act of production "adds little or nothing to the sum total of the Government's information." *Fisher v. United States*, 425 U.S. 391, 411 (1976).

Amici also argue that the foregone-conclusion doctrine is inapplicable because the State seeks "oral testimony," rather than existing documents. ACLU Br. 17; FACDL Br. 16–20. But the passcode exists, and the State asks Respondent only to reproduce it on paper. The logic of *Fisher* applies: the government has a right to the documents (in *Fisher* through a subpoena, here through a warrant); the act of production has limited testimonial significance (it conveys only existence, possession, and authenticity), and a defendant cannot defeat the government's right of access simply because disclosure may involve communications that "add[] little or nothing." *Fisher*, 425 U.S. at 411.

Fisher relied on *In re Harris*, 221 U.S. 274 (1911), where the Supreme Court explained that a "bankrupt" could be required to "afford the receiver free opportunity to inspect" his books because that did not compel him to be a "witness against himself." *Id*. at 278–79. Instead, the order merely "compell[ed] him to yield possession of

property that he no longer is entitled to keep." *Id.* at 279. So too here. Respondent is not "entitled to keep" private his cell phone's contents in the face of a warrant.

2. On the burden, Respondent asserts that the State must show "beyond a reasonable doubt" that it knows the contents of the phone with "reasonable particularity." Ans. Br. 51.

a. As to particularity, Respondent and *amici* contend that the State must prove it knows that Respondent has the passcode *and* that it knows the contents of the phone. Ans. Br. 52; ACLU Br. 20; FACDL Br. 20–23. Precedent rebuts that theory. *See United States v. Hubbell*, 530 U.S. 27, 40 (2000) (holding that "[t]he 'compelled testimony' that is relevant in this case is not to be found in the contents of the documents produced . . . [i]t is, rather, the testimony inherent in the act of producing those documents"). The inquiry is whether the State knows Respondent possessed the phone—the only purported testimony revealed by producing the passcode.

Respondent nevertheless asks the Court to read into the Fifth Amendment a particularity requirement—a standard drawn from the text of the *Fourth* Amendment, *see* U.S. Const., amend. IV (warrants

must "particularly describ[e] the place to be searched, and the persons or things to be seized")—because "the Fourth Amendment and the Fifth Amendment requirements naturally interlock." Ans. Br. 53. According to Respondent, "mov[ing] to quash the search warrant as overly broad in violation of the Fourth Amendment" would require him to establish standing, which would "require[] [him] to provide the type of admission his Fifth Amendment privilege is meant to protect." *Id*. In other words, he thinks the Fifth Amendment must incorporate the Fourth Amendment's protections so that, in asserting his Fourth Amendment rights, he is not forced to incriminate himself.

That misses two things. First, the Fourth and Fifth Amendments do *not* overlap. *See Fisher*, 425 U.S. at 401.[1] Second, "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt." *See Simmons v. United States*, 390 U.S. 377, 394 (1968). Thus, nothing stopped Respondent from challenging the warrant in the trial court.

[1] If indeed the Fourth and Fifth Amendments "naturally interlock," the standard should simply be "probable cause," U.S. Const., amend. IV, not beyond a reasonable doubt. Ans. Br. 51–60.

Had he, that claim would have failed. The warrant properly identifies the place to be searched—the "Samsung Galaxy Note 8; IMEI:358503087212156"—and the things to be seized—"evidence . . . in the form of contact/phone lists, call logs, SMS (Simple Message Service, a/k/a/ text) messages, MMS messages, and/or graphic or video files and/or any other relevant data" related to "Aggravated Stalking with Credi[b]le Threat." App'x 12.

b. In support of the beyond-a-reasonable-doubt standard, Respondent claims that the preponderance standard is too "paltry" to safeguard the right against self-incrimination. Ans. Br. 52. But both this Court and the Supreme Court have embraced that standard for Fifth Amendment suppression issues, *Balthazar v. State*, 549 So. 2d 661, 662 (Fla. 1989); *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974), and Respondent has not shown why it suffices there but not here. The beyond-a-reasonable-doubt standard, by contrast, ensures that a defendant's guilt must be certain before criminal punishment may be imposed; but guilt is determined at trial, not in a pretrial hearing.

Respondent also claims that the phrase "foregone conclusion"

implies a very high evidentiary burden. Ans. Br. 56–57. *Fisher* itself belies that. There, the Court found a foregone conclusion even without individualized proof that the records existed and were in the taxpayer's possession, because the documents were "the kind *usually* prepared by an accountant" for a client. *Fisher*, 425 U.S. at 411 (emphasis added). That inference would hardly meet Respondent's beyond-a-reasonable-doubt standard.

3. Here, the State already has ample evidence that the phone belongs to Respondent. *First*, the victim told police that Respondent had been stalking her days before the crime and that on the night in question she heard his car leaving her boyfriend's residence where the phone was found, App'x 3–4, 9–10; *second*, the victim identified the phone as Respondent's and when police asked her to call Respondent's phone, the black Samsung began ringing, *id.* at 4, 10; and *third*, the phone number for Respondent in the police report matches the Samsung, *id.* at 4, 8, 10. Thus, as in *Fisher*, "[s]urely, 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." 425 U.S. at 411.

Respondent does not contest that these facts, if established, would show he possessed the phone. He instead claims that the State failed to "offer[] . . . evidence" at the motion to compel hearing. Ans. Br. 64.

But evidentiary hearings are used to resolve "disputed material factual question[s]." *Marek v. State*, 14 So. 3d 985, 1002 (Fla. 2009). And far from denying that the phone was his, Respondent's trial-court response appeared to acknowledge that the Samsung password was "his password." App'x 24. Accordingly, an evidentiary hearing would only "cause the parties unnecessary expense." *Allstate Ins. Co. v. Browne*, 817 So. 2d 994, 998 (Fla. 4th DCA 2002).

Either way, the State *did* "offer[] . . . evidence": two sworn affidavits discussing the facts above. Affidavits can establish all manner of facts at pretrial hearings in criminal cases, *see, e.g.*, *State v. Arthur*, 390 So. 2d 717, 720 (Fla. 1980) ("[E]vidence may be presented in the form of transcripts or affidavits."), and Respondent has not shown why this context is different.

III. THIS COURT SHOULD REJECT RESPONDENT'S RULE 3.220 CLAIM.

Finally, Respondent asserts for the first time that Florida Rule of Criminal Procedure 3.220—governing criminal discovery—"does

[not] allow a court to compel a defendant to provide a passcode." Ans. Br. 40–42. He argues that any type of discovery not listed in Rule 3.220(c) is "specifically excluded." *Id.* at 41. But Respondent overlooks Rule 3.220(f), which provides that "[o]n a showing of materiality, the court may require such other discovery to the parties as justice may require." Fla. R. Crim. P. 3.220(f). That authorized this order.

Moreover, courts have "inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction." *Rose v. Palm Beach Cnty.*, 361 So. 2d 135, 137 (Fla. 1978); *see also* Art. V, § 5(b), Fla. Const. (circuit courts "shall have the power to issue . . . all writs necessary or proper to the complete exercise of their jurisdiction"). A circuit court's jurisdiction includes issuing search warrants when "any property shall have been used . . . [a]s a means to commit any crime," § 933.02(2)(a), Fla. Stat., or when property "constitutes evidence relevant to proving that a felony has been committed," *id.* § 933.02(3). Because Respondent's passcode blocks execution of the search warrant, compelling him to reveal the passcode is reasonably necessary to enforce the court's

warrant authority.

CONCLUSION

Respondent cannot nullify a search warrant by refusing access to his property. This Court should quash the decision below.

Dated: August 13, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 3,999 words.

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CERTIFICATE OF SERVICE

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

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