

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)	No. SC20-1419
<i>Petitioner,</i>)	
)	DCA No. 5D19-590
v.)	
)	
JOHNATHAN DAVID GARCIA,)	
<i>Respondent.</i>)	APPENDIX TO
_____)	INITIAL BRIEF

INDEX

Affidavit for Arrest Warrant (Mar. 22, 2018).....3

Arrest Warrant (Apr. 25, 2018).....7

Arrest Affidavit (Apr. 25, 2018).....6

Application and Affidavit for Search Warrant (Jan. 3, 2019).....9

Search Warrant (Jan. 4, 2019) 12

Amended Information (Jan. 11, 2019) 14

State’s Motion to Compel Defendant’s Phone Passcode (Feb. 26, 2019) 17

Transcript of Hearing – March 4, 2019 19

Order (Mar. 4, 2019)28

Slip Opinion, *Garcia v. State*, No. 5D19-590 (Fla. 5th DCA Aug. 28, 2020) 30

Certificate of Service41

RECEIVED, 03/12/2021 05:24:28 PM, Clerk, Supreme Court

Dated: March 12, 2021

Respectfully submitted,

ASHLEY MOODY
Attorney General

/s/ Jason H. Hilborn

AMIT AGARWAL (FBN125637)

Solicitor General

JEFFREY PAUL DESOUSA (FBN110951)

Chief Deputy Solicitor General

CHRISTOPHER J. BAUM (FBN1007882)

Senior Deputy Solicitor General

JASON H. HILBORN (FBN1008829)

Assistant Solicitor General

Office of the Attorney General

The Capitol, PL-01

Tallahassee, Florida 32399

(850) 414-3300

amit.agarwal@myfloridalegal.com

jeffrey.desousa@myfloridalegal.com

christopher.baum@myfloridalegal.com

jason.hilborn@myfloridalegal.com

Counsel for State of Florida

Previously Assigned to Div:
-HI-

AGENCY CASE NUMBER: **18-22199**
COURT CASE NUMBER: **2018 CF 5112**

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA** 10

STATE OF FLORIDA

vs.

NAME: **Johnathan David Garcia**

D.O.B: **08/28/1981** RACE/SEX: **Hispanic/Male**

HOME ADDRESS: **14705 Bray Road, Orlando, FL 32832.**

PHYSICAL DESCRIPTION: HEIGHT: **5'11** WEIGHT: **220** HAIR: **Black** EYES: **Brown**

SOCIAL SECURITY NUMBER: **059-66-4339**

DRIVERS LICENSE NUMBER: **Florida; G620-424-81-308-0**



STATE OF FLORIDA
COUNTY OF ORANGE

Comes now the affiant, **Frank Tagler, 7973**, a sworn law enforcement officer, to wit: **a Deputy for the Sheriff of Orange County, Florida**, before **The Honorable Hon Patricia I Stowbridge, Judge, in and for Orange County, Florida**, Ninth Judicial Circuit, who makes this affidavit and states under oath that affiant has probable cause to believe that certain laws have been violated Orange County, Florida, and that on/between **March 08, 2018**, the Defendant, **Johnathan David Garcia**, did violate Florida State Statute(s), and commit the offense(s) of:

C1 AGGRAVATED STALKING 784.048(3)

Your affiant, **Frank Tagler, 7973**, is and has been since **08/13/2015**, a duly sworn Deputy Sheriff for the Sheriff of Orange County, Florida.

Your Affiant, has a bachelors dsgree, completed courses and training in different investigations, is a field training officer, and has participated in many different cases and investigations druing his time with the Orange County Sheriff's Office.

YOUR AFFIANT, IN THE COURSE OF HIS/ HER OFFICIAL DUTIES, HAS COME TO INVESTIGATE:

On **March 8, 2018** at approximately **2300** hours, I responded to a single family residence located at **3943 Green Sable Dr.** within Orange County, FL.; reference criminal mischief (case number **18-22192**) and stalking(case number **18-22199**). Upon arrival I made contact with **Terrell Collins** (witness) and **Ana Diaz** (victim).

Both **Terrell** and **Ana** provided sworn verbal/written statements. **Terrell** stated the following:

At approximately **2230** hours **Terrell** was in his bedroom lying in bed next to **Ana** when **Ana** heard an unknown noise at the rear north facing window to the bedroom. Immediately after hearing the noise an unknown object struck the window and completely shattered the glass, throwing glass inside on to the bed and causing a minor laceration to **Terrell's** right elbow.

Terrell stated he did not see who broke the window and gave no one permission to break window. **Terrell** stated he does want to prosecute and will testify in court. **Terrell** believes the damage will

cost \$3000.00 U.S. currency to repair.

I then spoke to Ana who provided the following:

Ana was visiting her boyfriend Terrell at his residence, while lying in bed Ana heard a loud bang and the north facing bedroom window shattered. As emergency services was called, Ana stated she could hear a vehicle similar to her ex-boyfriend's, Johnathan Garcia (suspect) leaving the scene. Ana stated she did not see the vehicle or the subject who broke the window, but believes it to be her ex-boyfriend, Johnathan.

After gathering statements I began searching the outside of the residence and photographing the damage to the window, a black Samsung Galaxy Note8 was found approximately 4 to 5 feet from the broken window. The phone and its proximity to the window were photographed. The phone was taken as evidence.

Ana identified the black Samsung as belonging to Johnathan. Ana was requested to call the phone number she had saved as Johnathan's cell phone number 407-334-8834. When Ana called the number the collected Samsung began to ring and the contact on the home screen read "Ana", with Ana's phone number displayed. I asked Ana if Johnathan knew where Terrell's residence was, she replied no.

Ana stated she had dated Johnathan for approximately 9 years and had ended the relationship approximately 1 year and 6 months ago. There is a history of documented dating violence between Ana and Johnathan. There is also prior case of stalking filed with the State Attorney's Office from 04/16/2016 (see Orange County case number 16-034015). Ana stated Johnathan's behavior has placed her in fear for her safety.

It should also be noted Terrell had also stated that Johnathan's past behavior, prior to this incident has caused him to fear for Ana's safety, so much so that he recently purchased a firearm and picked the handgun up 03/08/2018.

Ana stated two days prior to this incident, Johnathan had followed her to a bakery where she met with Terrell. Ana believes it is possible Johnathan followed Terrell or her back to Terrell's residence; due to the fact Johnathan did not have knowledge of Terrell's residence.

Based on the criminal mischief (FSS 806.13(1)(B)(3) see case number 18-22192) Johnathan willfully and maliciously damaged property, specifically the window, which belonged to the Terrell. Ana's and Terrell's statements of Johnathan following Ana, the past documented history of dating violence and stalking between Jonathan and Ana; Johnathan has created pattern of conduct which has Ana reasonably fearing for her safety.

Due to above Johnathan has willfully, maliciously, and repeatedly followed, and harassed Ana. Johnathan's escalation in his harassment and willful destruction of property has created a pattern of conduct which has implied a credible threat to Ana's safety. Thus, probable cause exists to charge Johnathan Garcia with Aggravated Stalking (FSS 784.048(3)).

Johnathan's cell phone was collected and submitted as evidence.

Frank Tagler, 7973

AFFIANT

SWORN TO AND SUBSCRIBED before me in the County and State aforesaid this 22nd day of March, 20 18 .

• eWarrant (v4.0)

Sergeant Ben Thorpe; 3680

PLACED UNDER OATH BY

ARREST WARRANT

Previously Assigned to Div:
-HI-

AGENCY CASE NUMBER: 18-22199
COURT CASE NUMBER: 2018CF0112

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND **(10)**
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA
vs.
JOHNATHAN DAVID GARCIA

WARRANTS
UNIT



D.O.B: 08/28/1981 Height: 5'11
Race/ Sex: Hispanic/Male Weight: 220
Hair: Black Eyes: Brown
Social: 059-66-4339 DL: Florida; G620-424-81-308-0
Address: 14705 Bray Road, Orlando, FL 32832

APR 10 2018

A R R E S T W A R R A N T

Continued

Previously Assigned to Div:
-HI-

AGENCY CASE NUMBER: 18-22199
COURT CASE NUMBER: _____

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA**

**WARRANTS
UNIT**

**STATE OF FLORIDA
vs.
JOHNATHAN DAVID GARCIA**

THE STATE OF FLORIDA
TO: ALL AND SINGULAR SHERIFF'S OF THE STATE OF FLORIDA; SPECIAL AGENTS OF THE
FLORIDA DEPARTMENT OF LAW ENFORCEMENT; AND/OR ANY INVESTIGATOR OF THE
SEVERAL STATES ATTORNEY'S OFFICE:

An Affidavit or sworn Complaint having this day been presented to me, the Honorable
Hon. Patricia L Strowbridge, Judge, in and for Orange County, Florida, Ninth
Judicial Circuit wherein it is alleged that on/between March 08, 2018, and present in ORANGE
COUNTY, Florida, the Defendant, Johnathan David Garcia, did in violation of Florida State Statutes and
commit the offense(s) of:

CI AGGRAVATED STALKING **784.048(3)**

Therefore, you are hereby commanded to arrest instanter the said Defendant if he/she be found within your
jurisdiction, and bring him/her before the proper court to be dealt with according to law.

CI No Bond

The said Defendant shall be admitted to bail in the total sum of \$ No Bond.

Other conditions of release shall include: No contact with victim, No return to the Scene,
No weapons or Firearms



JUDGE Hon. Patricia L Strowbridge
**ORANGE COUNTY, FLORIDA
NINTH JUDICIAL CIRCUIT**

RETURN

Received the within original Warrant on the ___ day of _____, _____, and executed
the same in _____ COUNTY, Florida on the ___ day of _____, _____, by
arresting the within named Defendant, and at the same time informing him/her of the cause of arrest and
the issuance of this warrant.

Jerry Demings
SHERIFF OF ORANGE COUNTY

By _____, D/S

Orange County ICJIS Warrant Arrest Affidavit

Writ [] VOP [] Fugitive [] Document #: 802106 Division #: 10 Court Case #: 2018CF005112AO

Document Date: 04/25/2018

Location of Defendant Vehicle: RTF Date-Time Booked: 04/25/2018 18:42 Agency Case Number: 18-38057

(ORI) : FL0480000 Agency Name: ORANGE COUNTY SHERIFF'S OFFICE FCIC/NCIC Check: [x] Date-Time of Arrest: 04/25/2018 18:08

Address of Arrest: W 14 EX/BEACHLINE EX Total Bond Amt: 0 Bond Status:

DEFENDANT Adult [x] Juvenile [] Jacket Number: Inmate Number: 18012275 Language: ENGLISH

NAME (L,F,M): GARCIA, JOHNATHAN DAVID A.K.A.: Race: W Sex: M DOB: 08/28/1981 Age: 36

Height: 5'11" Weight: 220 Hair: BLK Eyes: BRO POB City: QUEENS POB State: NY POB Country: US

RES Street#: 2742 CORAL REEF DR Citizenship: US

City: ORLANDO State: FL Zip: 32826 Home Phone: Other Phone: (407) 334-8834

Scars/Tattoos: Ethnicity: HISPANIC

Driver's License/ State ID No: G620424813080 State: FL Year Expires: 2019 SSN #:

Business and Occupation: Bus Phone:

Bus Street#: City: State: Zip:

Next of Kin Name: Phone:

Next of Kin Street #: City: State: Zip:

Out of State Warrant Arrest: Book as Fugitive from Justice. FSS 941.14, JTT 941.02 NO BOND

OFFENSES: Felony [x] Misd. [] ORD. [] Traffic [] Out of County [] Court Location: CIRCUIT Domestic Violence? N

Original Agency Name / ORI: - FL0480000 Original Agency Case Number: 2018CF005112AO Originating State and/or County: ORANGE/FL

Table with 4 columns: Count, Bond Amount / Bond Status, FSS, and Description. Row 1: 1, 0.00 / No Bond, 784.048 3, AGGRAVATED STALKING WITH A CREDIBLE THREAT

ORIGINAL OFFENSE IF KNOWN ON VOP, FUGITIVE, FTA ONLY

1 AGGRAVATED STALKING

[x] I, being an Orange County Deputy, read and executed the above capias to the above named defendant.

NARRATIVE:

On April 25, 2018, at approximately 1736 hours, I made contact with Johnathan Garcia (defendant) during a traffic stop. Upon a check of Garcia's name in FCIC/NCIC through Teletype I discovered a confirmed OCSO warrant (2018CF005112AO). I secured Garcia in handcuffs (double locked) and transported him to BRC without incident.

Sworn to and subscribed before me, this 25 day of April year 2018

Notary Public [x] Law Enforcement or Corrections Officer [] Personally Known [] Produced Identification [] Type of Identification

Notary Signature: [Signature] NOTARY PUBLIC STATE OF FLORIDA

I swear or affirm the above statements are correct and true (407) 254-7000

Officer's Signature: [Signature] Officer's Bus. Phone No. GILBERTI, CHRISTOPHER / 6856

Notice to Defendant Regarding Social Security Number: This Law Enforcement Agency has collected your social security number (SSN) as required by FSS 119.071. This agency will use it for the purpose of confirming your identity, and sharing it with other governmental agencies to identify records linked to that SSN. This collection and use of your SSN is required by this agency to fulfill its lawful duties and responsibilities.

LONGARDNER, HEATHER GG132602 / 08/07/2021 Notary Name Notary Commission # / Exp. Date

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

ORANGE COUNTY SHERIFF'S OFFICE CASE NUMBER: 18-022199

COURT CASE NUMBER: _____

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

STATE OF FLORIDA
COUNTY OF ORANGE

Comes now the affiant, **Frank Tagler**, a sworn law enforcement officer, to-wit: **a Deputy for the Sheriff of Orange County, Florida**, before **The Honorable _____, Judge, in and for Orange County, Florida, Ninth Judicial Circuit**, who makes this application and states under oath that affiant has probable cause to believe that certain laws have been violated in Orange County, Florida, to-wit: **Aggravated Stalking with Credible Threat (FSS 784.048(3))** and that evidence relating to that crime is stored within the following:

1) **Samsung Galaxy Note8; IMEI:358503087212156**

The aforementioned evidence being sought is in the form of contact/phone lists, call logs, SMS (Simple Message Service, a/k/a text) messages, and MMS messages, and / or graphic or video files and/or any other data that may be relevant to this investigation which are stored within the phone device. The **Samsung Galaxy Note8; IMEI:358503087212156** is currently being kept under the control of the Orange County Sheriff's Office Digital Forensics Lab and which property has the unique address of 2500 West Colonial Drive, Orlando, Florida and is particularly described and can be located as follows:

DIRECTIONS:

From the intersection of Orange Avenue and Colonial Drive travel west Colonial Drive approximately 2.2 miles. Turn left at the traffic light into the Orange County Sheriff's Office Operations Center, which is a large building on the south side of Colonial Drive with the Orange County Sheriff's Office Logo painted on the front of the building.

Your affiant, **Frank Tagler**, is and has been since **August 13, 2015**, a duly sworn Deputy Sheriff for the Sheriff of Orange County, Florida.

I have been a sworn law enforcement officer for over three years. During that time I have worked in uniform patrol and am currently assigned to Narcotics Investigations. I have training and experience in the following: Criminal Investigations, Criminal Law, Drug Identification, Traffic Operation, and Motor Vehicle Operations. During my tenure with the Orange County Sheriff's Office, I have been responsible for and involved with numerous criminal investigations involving electroic communications.

As a result of your affiant's training and experience as set forth above, and the results of my investigation, your affiant has probable cause to believe the following:

On March 8, 2018 at approximately 2300 hours, I responded to a single family residence located at 3943 Green Sable Dr. within Orange County, FL.; reference a criminal mischief (case number 18-

22192) and stalking(case number 18-22199). Upon arrival I made contact with the victim and her boyfriend (home owner).

The victim was visiting her boyfriend at his residence, while lying in bed, the victim heard a loud bang and the bedroom window shattered. The victim stated she could hear a vehicle similar to her ex-boyfriend's, (suspect) leaving the scene, as emergency services were called. The victim stated she did not see the vehicle or the subject who broke the window, but believes it to be her ex-boyfriend.

Upon searching the outside of the residence and photographing the damage to the window, a black Samsung Galaxy Note8 was found approximately 4 to 5 feet from the broken window. The phone and its proximity to the window were photographed. The phone was taken as evidence. The victim identified the black Samsung as belonging to the suspect. The victim was requested to call the phone number she had saved as the suspect's cell phone number 407-334-8834. When she called the number the collected Samsung began to ring and the contact on the home screen read the victim's name, with victim's phone number displayed.

On April 17, 2018, Deputies responded to 3943 Green Sable Dr.; reference the collection of a GPS tracker discovered by the victim on her vehicle. A preliminary search through Google of the part number located on the item returned a hit to Amazon.com. According to Amazon.com, the item is a MasTrack MT-OBD live GPS vehicle tracker. The item was collected and submitted into evidence reference this case number.

Based on information of the MasTrack product, the tracker can be tracked by electronic applications i.e. cell phones or computer.

There is probable cause to believe the black Samsung Galaxy Note8 recovered from 3943 Green Sable Dr. contains storage of evidentiary data pertaining to Aggravated Stalking with Credible Threat (FSS 784.048(3))

Based on the foregoing and your affiant's knowledge, training and experience, and the facts discovered during this investigation, your affiant has probable cause to believe that the information being sought may be evidentiary in nature.

Your affiant is familiar that computer systems and cellular devices can be used as instruments in a criminal act or the fruit of a crime. Computers and cell phones can store information in internal or peripheral storage devices, including but not limited to fixed disks, external hard disks, floppy diskettes, tape drives, optical storage devices, and numerous other storage devices of data.

Also, based on your affiant's training, experience and personal use of computer systems and cell phones, your affiant knows that users of cell phone technology often save information or created files to storage devices/media.

Your affiant requests the authorization to search and analyze the Samsung Galaxy Note8; IMEI:358503087212156 which also includes central processing units, internal and peripheral storage, memory storage devices or media such as optical disks, or any other storage media where data can be stored, together with indicia of use, ownership, possession, or control of such data. Other data of relevance to this incident includes video files (digital, analog or any other format), still photo camera files (digital, analog, or any other format), e-mails, chat logs, passwords/login names, and internet access documents, history and cache. The actual analysis of any seized digital evidence will be conducted at a later time due to the protracted time a computer forensics investigation takes.

Your Affiant or his designee has taken custody of the Samsung Galaxy Note8; IMEI:358503087212156 and the articles needed for analysis are properly logged. The exhibits will be physically examined, documented and

later examined for evidence of these crimes. The results of the examination will be presented by your affiant or designee and later forwarded to the Office of the State Attorney. The RETURN portion of this warrant will reflect the actual seizure of articles. The examination may exceed ten days or more based on the high volume of data to be processed and examined, but all results will be submitted as evidence at a later date.

When records or evidence are stored in internal and peripheral storage, or any other storage media where data can be stored, it is common to find that specific records authorized to be seized are inextricably mixed and without technically difficulty or extremely time-consuming procedures are inseparable from other records, programs, or files (similar to a bound-volume book containing financial records, addresses, a diary, and notes, for example). The storage medium containing records or evidence relating to the crime under investigation will be seized for analysis, but only those items authorized to be seized by the warrant will be printed out, disclosed, stored on an evidence disk, or otherwise copied for evidence purposes. Any other items that can be separated out from such evidence will be returned upon completion of the forensic analysis.

WHEREFORE, your affiant makes this affidavit and requests the issuance of a Search Warrant in due form of law authorizing a search of the above-described property by officers of the law for evidence heretofore described and for the seizure and safekeeping of said evidence, subject to the order of a Court having jurisdiction thereof.

Frank Tagler

Affiant

SWORN TO and SUBSCRIBED before me this **03** day of **January**, 20**19**.

Corporal Michael Fairley / 6216

PLACED UNDER OATH BY

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

ORANGE COUNTY SHERIFF'S OFFICE CASE NUMBER: 18-022199

COURT CASE NUMBER: _____

S E A R C H W A R R A N T

IN THE NAME OF THE STATE OF FLORIDA:

TO: **JOHN W. MINA, SHERIFF OF ORANGE COUNTY, FLORIDA, AND/OR ANY OF HIS DULY SWORN DEPUTIES OR SPECIAL DEPUTIES OR AGENTS; OR ANY QUALIFIED PERSON(S) AS REQUESTED BY ANY DULY SWORN DEPUTY, SPECIAL DEPUTY OR AGENT; OR ANY LAWFULLY SWORN SPECIAL INVESTIGATOR OF THE STATE ATTORNEY FOR THE NINTH JUDICIAL CIRCUIT OF FLORIDA.**

WHEREAS, a sworn, written application for a search warrant has been made this day before me, **The Honorable Wayne Wooten**, Judge, in and for Orange County, Florida, Ninth Judicial Circuit,

AND WHEREAS, the facts made known to me in the APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT which is attached hereto and incorporated herein by reference and sworn to by **Frank Tagler, a sworn law enforcement officer, to-wit: a sworn Deputy for the Sheriff of Orange County, Florida**, on this date, have caused me to certify and find that there is probable cause to believe that certain laws have been violated in Orange County, Florida, to-wit: **Aggravated Stalking with Credible Threat (FSS 784.048(3))** and that evidence relating to that crime is stored within the following:

Samsung Galaxy Note8; IMEI:358503087212156

The aforementioned evidence being sought is 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 which are stored within the phone device.

NOW, THEREFORE, YOU or either of you, with such lawful assistance as may be necessary, **ARE HEREBY COMMANDED**, in the day time, nighttime or on Sunday, as the exigencies of the situation may require, **TO ENTER AND SEARCH** the above-described **Samsung Galaxy Note8; IMEI:358503087212156, FOR THE EVIDENCE** described in the warrant, and if same or any part thereof be found, you are hereby authorized to seize and secure said evidence, giving proper receipt therefore and delivering a completed copy of this warrant to the person in control of the property and making a return of your doings under this warrant within ten (10) days of the date hereof, and you are further directed to bring said evidence so found before the Court having proper jurisdiction to be disposed of according to law.

WITNESS my hand this 4th day of January, 2019.



Judge
Orange County, Florida
Ninth Judicial Circuit

COURT CASE NUMBER: _____

OCSO CASE NUMBER: 18-022199

SEARCH WARRANT INVENTORY AND RECEIPT

Samsung Galaxy Note8; IMEI:358503087212156

DATED this **Day** day of **Month**, **Year**.

Frank Tagler

RETURN

**STATE OF FLORIDA
COUNTY OF ORANGE**

Received this Search Warrant on the **Day** day of **Month**, **Year**, and executed the same in Orange County, Florida, on the **Day** of **Month**, **Year**, by searching the premises described therein and by taking into my custody the property described in the above Inventory and Receipt and by having read and delivered a copy of this Search Warrant and Inventory and Receipt to :

NAME OF PERSON YOU LEFT A PROPERTY FORM WITH AT THE PLACE YOU SEARCHED OR IF NO ONE WAS HOME PUT "LEFT AT SCENE"

I, **Frank Tagler**, the officer by whom the Warrant was executed, do swear that the above Inventory and Receipt contains a true and detailed account of all the property taken by me on said Warrant.

Frank Tagler

SWORN TO and SUBSCRIBED before me
this _____ day of _____, _____.

NOTARY PUBLIC/DEPUTY COURT CLERK

IN THE CIRCUIT COURT OF ORANGE COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA

AMENDED
INFORMATION # 48-2018-CF-005112-O

VS.

DIVISION - 10

JOHNATHAN DAVID GARCIA

1. THROWING DEADLY MISSILE AT, WITHIN, OR INTO A BUILDING (F2-L6)
2. AGGRAVATED STALKING WITH A CREDIBLE THREAT (F3-L6)
3. AGGRAVATED STALKING WITH A CREDIBLE THREAT (F3-L6)
4. CRIMINAL MISCHIEF WITH DAMAGE OF MORE THAN \$200 (M1)
5. CRIMINAL MISCHIEF (M2)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

ARAMIS D. AYALA, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, or ARAMIS D. AYALA, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that JOHNATHAN DAVID GARCIA, on or about the 8th day of March, 2018, in said County and State, did, in violation of Florida Statute 790.19, wantonly or maliciously throw, hurl or project a missile, stone or other hard substance, which would produce death or great bodily harm, at, within, or into a building, to-wit: A DWELLING, located in the vicinity of 3943 Green Sabal Drive, Orlando, Florida.

COUNT TWO

ARAMIS D. AYALA, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, or ARAMIS D. AYALA, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that JOHNATHAN DAVID GARCIA, between the 1st day of March, 2018 and the 19th day of April, 2018, in said County and State, did, in violation of Florida Statute 784.048(3), knowingly, willfully, maliciously and repeatedly follow or harass or cyberstalk ANA DIAZ and make a credible threat or threats with the intent to place ANA DIAZ in reasonable fear of death or bodily injury.

COUNT THREE

ARAMIS D. AYALA, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, or ARAMIS D. AYALA, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that JOHNATHAN DAVID GARCIA, between the 1st day of March, 2018 and the 19th day of April, 2018, in said County and State, did, in violation of Florida Statute 784.048(3), knowingly, willfully, maliciously and repeatedly follow or harass or cyberstalk TERRELL COLLINS and make a credible threat or threats with the intent to place TERRELL COLLINS in reasonable fear of death or bodily injury.

COUNT FOUR

ARAMIS D. AYALA, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, or ARAMIS D. AYALA, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that JOHNATHAN DAVID GARCIA, on or about the 8th day of March, 2018, in said County and State, did, in violation of Florida Statute 806.13(1)(b)(2), willfully and maliciously injure or damage certain real or personal property, to-wit: GLASS WINDOW, the property of TERRELL COLLINS, as owner or custodian, such damage being greater than TWO HUNDRED DOLLARS (\$200.00).

COUNT FIVE

ARAMIS D. AYALA, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, or ARAMIS D. AYALA, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that JOHNATHAN DAVID GARCIA, on or about the 9th day of March, 2018, in said County and State, did, in violation of Florida Statute 806.13(1)(b)(1), willfully and maliciously injure or damage certain real or personal property, to-wit: VEHICLE TIRES, the property of ANA DIAZ, as owner or custodian.

This information encompasses the transaction and all charges listed on Complaint Number 48-2018-CF-005112-O. The Orange County Sheriff's Office and the Orange County Corrections Department shall substitute the charge(s) indicated on the information for those on the above cited complaint. The bond(s) shall remain the same as that last set on 48-2018-CF-005112-O.

STATE OF FLORIDA
COUNTY OF ORANGE

Personally appeared before me Alicia Lynn Modeen, Assistant State Attorney of the Ninth Judicial Circuit of Florida, who being first duly sworn, says that he/she has received testimony under oath from the material witness or witnesses, which if true, would constitute the offense herein, and that he/she institutes the prosecution in good faith.

The foregoing instrument was acknowledged before me this 11 day of January, 2019 by the aforementioned Assistant State Attorney who is personally known to me and who did take said oath.

ARAMIS D. AYALA, State Attorney
Ninth Judicial Circuit of Florida

By Alicia Lynn Modeen
Alicia Lynn Modeen
Designated Assistant State Attorney
Florida Bar No. 113878

AM/AM

Tarenda Franklin



TARENDA FRANKLIN
Commission # GG 179882
Expires February 22, 2022
Bonded Thru Budget Notary Services

IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT, IN AND FOR
ORANGE COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,

CASE NO: 48-2018-CF-005112-O

DIVISION: 10

vs.

JOHNATHAN DAVID GARCIA
Defendant.

Motion to Compel Defendant's Phone Passcode

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and respectfully requests entry of this Court's Order compelling the Defendant to provide a passcode and/or his fingerprint to unlock his mobile phone, and in support thereof would show that:

1. The Defendant, JOHNATHAN DAVID GARCIA, has been charged with two counts of Aggravated Stalking with a Credible Threat.
2. The Defendant's mobile phone was located on scene and collected as evidence.
3. When a forensic download of the phone was attempted by the Orange County Sheriff's Office, they were unable to unlock the Defendant's phone, which requires either a passcode or the Defendant's fingerprint.
4. The contents of the Defendant's phone are relevant to how the events occurred and whether the Defendant is guilty.
5. The information will be provided in open court with a trained individual from the Orange County Sheriff's Office present and will involve no unreasonable intrusions upon the body of the Defendant.
6. Counsel for the Defendant objects to the granting of this motion.

WHEREFORE, the State of Florida respectfully requests entry of this Court's Order authorizing the State to obtain the Defendant's passcode or fingerprint.

I CERTIFY that a copy hereof has been furnished to Marie Taylor, mtaylor@circuit9.org and Division10@circuit9.org, 435 North Orange Avenue, Suite 400, Orlando, FL 32801 by e-mail on this 26th day of February, 2019.



Alicia Lynn Modeen
Assistant State Attorney
Florida Bar # 113878
Division10@sao9.org
PO Box 1673, 415 N Orange Ave
Suite 300
Orlando, FL 32802-1673
407-836-2191

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN
AND FOR ORANGE COUNTY, FLORIDA

CASE NUMBER: 48-2018-CF-5112-A-OR
DIVISION 10

STATE OF FLORIDA,

Plaintiff,

vs.

JOHNATHAN DAVID GARCIA,

Defendant.

Orlando, Florida

March 4, 2019

TRANSCRIPT OF PROCEEDINGS

**Marge Raeder Court Reporter, Inc.
999 Douglas Avenue/Suite 3307
Altamonte Springs, FL 32714
407/774-6611**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S:

ALICIA MODEEN, ATTORNEY AT LAW
Assistant State Attorney
415 North Orange Avenue
Orlando, Florida 32801

Appearing on behalf of the Plaintiff.

MARIE TAYLOR, ATTORNEY AT LAW
ROBERT ADAMS, ESQUIRE
Assistant Public Defenders
435 North Orange Avenue
Suite 400
Orlando, Florida 32801

Appearing on behalf of the Defendant.

- - - - -

I N D E X

CERTIFICATE OF TRANSCRIPTIONIST

9

**Marge Raeder Court Reporter, Inc.
999 Douglas Avenue/Suite 3307
Altamonte Springs, FL 32714
407/774-6611**

1 TRANSCRIPT OF PROCEEDINGS held
2 before the Honorable Gail Adams
3 on Monday, March 4, 2019, at the Orange
4 County Courthouse, 425 North Orange Avenue,
5 Courtroom 18-D, Orlando, Florida.

6 - - - - -

7 THE COURT: So unless we're ready on Billy
8 Neil, I'm ready on Johnathan Garcia.

9 THE CLERK: Do you want me to call that case?

10 THE COURT: Sure.

11 THE CLERK: 2018-CF-5112, State of Florida
12 versus Johnathan David Garcia.

13 MS. MODEEN: Alisha Modeen for the State of
14 Florida.

15 MS. TAYLOR: Marie Taylor for the Defendant,
16 Johnathan Garcia.

17 THE COURT: I think it's the Defense's motion
18 to compel.

19 MS. MODEEN: No, your Honor.

20 THE COURT: The State.

21 MS. MODEEN: It's the State's motion to
22 compel.

23 THE COURT: Okey-doke. What's up?

24 MS. MODEEN: I didn't realize the Defendant
25 wasn't going to be present. I have somebody here

**Marge Raeder Court Reporter, Inc.
999 Douglas Avenue/Suite 3307
Altamonte Springs, FL 32714
407/774-6611**

1 from Orange County Sheriff's Office to potentially
2 unlock the phone if the compelled information is
3 -- or rather, if the sought after information is
4 compelled by your Honor.

5 THE COURT: Okay.

6 MS. MODEEN: But the State filed a motion to
7 compel the Defendant's phone passcode. In this
8 case, we have the Defendant's cellphone in
9 custody, in evidence. There has previously been a
10 warrant to search the phone issued by Judge Wayne
11 Wooten. I have a copy of that for your Honor, if
12 you'd like to see it.

13 THE COURT: Okay.

14 MS. MODEEN: But, unfortunately, we are
15 unable to conduct the download of the phone that
16 was authorized by that warrant because it is
17 passcode protected and there isn't a way to get
18 around it.

19 THE COURT: I just got an email about this.
20 Is there a new case about it?

21 MS. MODEEN: There are -- there are two cases
22 right now. In Florida there's a circuit split
23 between the Second and Fourth.

24 THE COURT: Well, if there's a warrant --

25 MS. MODEEN: Right.

**Marge Raeder Court Reporter, Inc.
999 Douglas Avenue/Suite 3307
Altamonte Springs, FL 32714
407/774-6611**

1 THE COURT: -- does that affect what -- I
2 haven't read the case law yet. Does affect how
3 the case law is interpreted?

4 MS. MODEEN: It doesn't, your Honor, because
5 in both cases the warrant has already been issued.
6 So probable cause has already been found by a
7 Court in order to search the phone based on the
8 affidavit filed.

9 THE COURT: Okay.

10 MS. MODEEN: So basically what a Court has
11 already found is that we are -- we are entitled to
12 the information and the data on the phone.

13 THE COURT: Okay.

14 MS. MODEEN: But essentially, the phone is
15 locked like a house and we cannot get into it.

16 THE COURT: But you've got the warrant to get
17 in the house.

18 MS. MODEEN: But I have the warrant to get
19 into it.

20 THE COURT: So, Defense, what's your
21 position?

22 MS. TAYLOR: Your Honor, Defense objects
23 based on -- based in part on the new case law that
24 your Honor did reference. And that citation, just
25 for the record, is G.A.Q.L. v. State, 257 So.3d

**Marge Raeder Court Reporter, Inc.
999 Douglas Avenue/Suite 3307
Altamonte Springs, FL 32714
407/774-6611**

1 1058 -- two-thousand -- oh, that's the Fourth DCA,
2 2018. And I do have a copy if your Honor would
3 like one.

4 THE COURT: I would love one. Thank you.

5 MS. MODEEN: And I have a copy of the Second
6 DCA case as well.

7 THE COURT: That's good. Is the State versus
8 Stahl?

9 MS. MODEEN: Correct.

10 THE COURT: Yes. I would love copies of both
11 of them. Thanks.

12 MS. TAYLOR: [To Ms. Modeen] Do you need
13 this one?

14 MS. MODEEN: I've got it right here.

15 THE COURT: Thank you.

16 MS. TAYLOR: And, your Honor, I'll let the
17 Court read through that, but just to state my
18 position, it would be that compelling the
19 Defendant in this case to disclose or provide his
20 password would be testimonial and would be in
21 violation of the Fifth Amendment based on the case
22 law provided.

23 THE COURT: Hmm.

24 MS. MODEEN: And Stahl finds the exact
25 opposite. Stahl found that the passcode or

Marge Raeder Court Reporter, Inc.
999 Douglas Avenue/Suite 3307
Altamonte Springs, FL 32714
407/774-6611

1 password information was not testimonial.

2 And they also did a subsequent analysis of
3 the foregone conclusion doctrine that found that
4 even if you were to find it to be testimonial, the
5 State can establish with particularity what
6 they're looking for is in the possession and
7 control of the Defendant, then the foregone
8 conclusion doctrine would provide an exception to
9 the Fifth Amendment right.

10 THE COURT: You're charging stalking; right?

11 MS. MODEEN: This is one of the charges, yes,
12 aggravated stalking.

13 THE COURT: And is what's in the phone got to
14 do with the stalking?

15 MS. MODEEN: Is does, your Honor. So --

16 THE COURT: The Court will grant the motion.
17 Over the State -- the Defense strenuous objection,
18 the Court will direct the Defendant -- he's not
19 present with me right now. So I'm going to direct
20 that he turn over his passcodes no later than noon
21 on -- when's your trial?

22 MS. MODEEN: Pre-trial is tomorrow, your
23 Honor. And the Defense filed a demand for speedy
24 trial in this case, so --

25 THE COURT: He needs to turn over the

Marge Raeder Court Reporter, Inc.
999 Douglas Avenue/Suite 3307
Altamonte Springs, FL 32714
407/774-6611

1 passcode no later than four o'clock today.

2 MS. TAYLOR: Your Honor, I didn't tell him to
3 take off for this hearing because he was planning
4 on being present for tomorrow. I wasn't aware
5 that his presence was mandatory. So I'd ask the
6 Court to give us until tomorrow because he's going
7 to be here --

8 THE COURT: Then nine o'clock tomorrow.

9 MS. TAYLOR: -- anyway for pre-trial.

10 THE COURT: So by nine o'clock tomorrow he's
11 got to turn over the passcode to you and you can
12 turn it over to the State.

13 MS. TAYLOR: Yes, your Honor. And just to be
14 clear for the record on this, is the Court finding
15 that the Stahl decision is controlling here?

16 THE COURT: Yes, I am. And I'm finding that
17 it's non-testimonial and it's pursuant to a
18 warrant that's already been issued based on
19 probable cause.

20 So nine o'clock tomorrow, you've got to turn
21 over the passcode.

22 All right. Let's call up Billy Neal.

23 MR. ADAMS: Your Honor, if I may also address
24 the case?

25 THE COURT: No, sir. I've ruled. Thank you.

Marge Raeder Court Reporter, Inc.
999 Douglas Avenue/Suite 3307
Altamonte Springs, FL 32714
407/774-6611

1 [Whereupon, the foregoing proceedings were
2 concluded.]

3 CERTIFICATE OF TRANSCRIPTIONIST

4 STATE OF FLORIDA:

5 COUNTY OF SEMINOLE:

6 I, Deborah C. Raeder Allen, Certified Court
7 Reporter and Transcriber, Notary Public, State of
8 Florida at Large, do hereby certify that I had
9 transcribed the foregoing proceedings as provided to me
10 by CD.

11 I further certify that the foregoing pages
12 numbered 3 through 8, inclusive, prepared under my
13 direction and supervision, constitute a true, complete
14 and accurate transcript of said proceedings to the best
15 of my skill and ability.

16 I further certify that I am not of counsel
17 for, nor related to any party herein or attorney
18 involved herein, nor am I financially interested in the
19 outcome of this action.

20 WITNESS MY HAND this 6th day of March 2019.

21 

22 DEBORAH C. RAEDER ALLEN, CER/CET,
23 Marge Raeder Court Reporter, Inc.
24 Certified Court Reporter and
25 Transcriber, Notary Public,
State of Florida at Large
Commission Number GG 262132
Expiration November 16, 2022

Marge Raeder Court Reporter, Inc.
999 Douglas Avenue/Suite 3307
Altamonte Springs, FL 32714
407/774-6611

MT

STATE OF FLORIDA
VS.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NUMBER: 2018-CF-005112-A-O
DIVISION: Adams, Gail A

JOHNATHAN DAVID GARCIA, Defendant

DOB: 8/28/1981

ORDER

This cause coming on this day for: **Hearing**, with Asst State Attorney, DIV. 10, present and you, the defendant, **JOHNATHAN DAVID GARCIA** being now Not Present **and represented by OFFICE OF PUBLIC DEFENDER, ESQUIRE** Present

Count: 1	THROWING DEADLY MISSILE AT, WITHIN, OR INTO A BUILDING	790.19	Second Degree - Felony
Count: 2	AGGRAVATED STALKING WITH A CREDIBLE THREAT	784.048(3)	Third Degree - Felony
Count: 3	AGGRAVATED STALKING WITH A CREDIBLE THREAT	784.048(3)	Third Degree - Felony
Count: 4	CRIMINAL MISCHIEF WITH DAMAGE OF MORE THAN \$200	806.13(1)(B)(2)	First Degree - Misd
Count: 5	CRIMINAL MISCHIEF	806.13(1)(B)(1)	Second Degree - Misd

COURT ORDERS:

Court Minutes

States motion to compel: Granted, over strenuous objection by defense.

The defendant is to turn over the passcode to his phone to the State by 3-5-19 no later than 9:00 AM.

Dates to remain as previously set.

DONE, ORDERED and FILED in Open Court on March 4, 2019

Honorable Judge: _____
Gail A Adams

JOHNATHAN DAVID GARCIA / 2742 CORAL REEF DR
ORLANDO, FL, 32826

Deputy Clerk in Attendance:
Office of Tiffany M. Russell, Orange County Clerk of the Circuit and County Courts

COPIES TO:

<input type="checkbox"/> Probation Email	<input type="checkbox"/> ACS	<input type="checkbox"/> State Atty	<input type="checkbox"/> Defense Atty
<input type="checkbox"/> Dockets	<input type="checkbox"/> C.F.S.C.	<input type="checkbox"/> Other	<input type="checkbox"/> Defendant

PAYMENT LOCATIONS (Monday – Friday) If paying by check/money order, please make check/money order payable to Orange County Clerk of Courts.

<p>Downtown 425 N. Orange Ave., Suite 250/410 Orlando, FL. 32801</p> <p>West Orange Branch 475 Story Rd. Ocoee, FL. 34761 Monday through Friday</p>	<p>Northeast Branch 450 N. Lakemont Ave. Winter Park, FL. 32792</p>	<p>Northwest Branch 1111 N. Rock Springs Rd. Apopka, FL. 32703</p> <p>Goldenrod Branch 684 Goldenrod Road Orlando, FL 32822</p>
---	--	---

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); see 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.

CERTIFICATE OF SERVICE

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

Robert Adams
Marie Taylor
Assistant Public Defender
435 North Orange Avenue Suite
400 Orlando, FL 32801
radams@circuit9.org
(407) 270-0402

Counsel for Respondent

/s/ Jason Hilborn
Assistant Solicitor General