

No. 19-1254

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

JOSEPH J. DAVIS,
Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO THE
SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

For more than forty years, courts have allowed law enforcement authorities to compel an individual to disclose information when the information adds little or nothing to the sum total of information already possessed by the government and is a foregone conclusion. During that same time, advances in technology have changed the ways information may be stored to include electronic media as opposed to paper documents, which were the exclusive manner of keeping business records in former days. Concurrent with the development of electronic media has been the creation of the means of making information inaccessible through virtually unbreakable encryption technology. Both developments have given rise to criminal activity that takes advantage of new technology and an urgent need for law enforcement to access data and information kept beyond its lawful reach by the encryption technology. This Court has not considered the foregone conclusion doctrine in the context of electronic media and encryption.

1. Does the foregone conclusion exception to the Fifth Amendment privilege against self-incrimination established in *Fisher v. United States*, 425 U.S. 391 (1976) and its progeny apply to the compelled production of passwords to encrypted electronic devices when the government has seized a device pursuant to a valid search warrant and has independent knowledge that the password exists, is known

by the suspect, and will decrypt the device, such that the compelled information itself lacks testimonial significance and any testimony implied by the compelled act is already known by the government, not in issue, and adds little or nothing to the sum total of the government's information?

2. Assuming the foregone conclusion exception applies, what is the government's burden of proof to support the exception, and more specifically, must the government demonstrate knowledge relating solely to the password sought or must it also demonstrate knowledge of the contents of the encrypted device for which a judge has already authorized a search?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	Error! Bookmark not defined.iii
TABLE OF CITED AUTHORITIES.....	iv
ARGUMENT IN REPLY TO PETITIONER'S BRIEF IN OPPOSITION	1
A. RESPONDENT'S ARGUMENT THAT THE SUPREME COURT OF PENNSYLVANIA'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT IS FALSE.....	1
CONCLUSION.....	10

TABLE OF CITED AUTHORITIES

	Page
<u>Cases</u>	
<i>Doe v. United States</i> , 108 S.Ct. 2341 (1988).....	3
<i>Fisher v. United States</i> , 425 U.S. 391 (1976).....	3
<i>State v. Andrews</i> , 2020 WL 4577172 (N.J. Aug. 10, 2020).....	<i>passim</i>
<i>United States v. Doe</i> , 465 U.S. 605 (1984).....	3
<i>United States v. Hubble</i> , 120 S.Ct. 2037 (2000).....	3
<i>Wilson v. United States</i> , 221 U.S. 361 (1911).....	2

ARGUMENT IN REPLY TO PETITIONER'S
BRIEF IN OPPOSITION¹

A. Respondent's argument that the Pennsylvania Supreme Court's decision does not conflict with the decision of another state court of last resort is false.

On August 10, 2020, Respondents' argument in opposition to the Petition for Writ of Certiorari -- that the Pennsylvania Supreme Court's majority decision does not conflict with the decision of another state court of last resort -- was *obliterated*. On that date, the Supreme Court of New Jersey held in a 4-3 decision that when the government has seized encrypted cellphones pursuant to a valid search warrant and has independent knowledge that decryption passcodes exist, are known and possessed by the suspect, and will decrypt the devices, the foregone conclusion exception to the Fifth Amendment privilege against self-incrimination applies and a court order *compelling the suspect to produce the passcodes to the government* does not violate the Fifth Amendment. This determination directly conflicts with the Supreme Court of Pennsylvania's majority Opinion, which held precisely the opposite.

In *State v. Andrews*, 2020 WL 4577172 (N.J. Aug. 10, 2020), the Supreme Court of New Jersey was confronted with the virtually identical scenario presented to the Pennsylvania Supreme Court, namely the defendant was charged with criminal offenses and ordered to produce to the government the

¹ Petitioner apologizes for the delayed filing of its reply brief, which was caused in large part by complications arising out of the Covid-19 pandemic.

passcodes to his two cellphones that were seized pursuant to a lawful warrant. The defendant, a police officer criminally charged for assisting the subject of a law enforcement investigation in order that the suspect avoid detection, objected to the order compelling the act of production, claiming that it violated his federal right against self-incrimination because: (1) it required him to utilize the contents of his mind to communicate information to law enforcement that might lead to the discovery of incriminating evidence; (2) the foregone conclusion exception to the act of production doctrine established by the United States Supreme Court does not apply outside the context of paper documents; and (3) the government had failed to establish that it had particularized knowledge of the contents of his cellphones as opposed to the passcodes.

Following a thorough review of the record facts and the relevant federal and state legal authorities, including the decisions of this Court, that in any way touched upon the question presented, the Supreme Court of New Jersey rejected the defendant's contentions and affirmed the order compelling him to produce the passcodes to his cellphones.

Following a thoughtful analysis of this Court's existing precedent on the act of production doctrine and the foregone conclusion exception thereto,² the

² Among other authorities, the Court discussed *Wilson v. United States*, 221 U.S. 361, 386 (1911) (upholding contempt finding against corporate officer who failed to comply with grand jury subpoena compelling disclosure of potentially incriminating corporate records in his possession, explaining that "the fact of

actual possession or of lawful custody would not justify the officer in resisting inspecting, even though the record was made by himself and would supply the evidence of his criminal dereliction”); *Fisher v. United States*, 425 U.S. 391, 411 (1976) (emphasis added) (quotation marks omitted) (“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. ... 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...no constitutional rights are touched. *The question is not of testimony but of surrender*”); *United States v. Doe*, 465 U.S. 605 (1984) (“*Doe I*”) (finding that a valid claim of the privilege against self-incrimination had been asserted which the government could rebut by producing evidence that possession, existence, and authentication were a “foregone conclusion” but in this case failed to do; finding significant that the respondent did not concede in the lower court that the records listed in the subpoena actually existed or were in his possession); *Doe v. United States*, 108 S.Ct. 2341, 2350 (1988) (“*Doe II*”) (“consistent with the Fifth Amendment, individuals may be compelled to execute an authorization directing a foreign bank to disclose account records because neither the form nor its execution communicates any factual assertions or conveys any information to the government); *United States v. Hubble*, 120 S.Ct. 2037, 2045-46 (2000) (“[t]he ‘compelled testimony’ that is relevant in this case is not to be found in the contents of the documents produced in response to the

Supreme Court of New Jersey summarized the current state of this Court's jurisprudence:

From those cases...the following principles can be inferred: For purposes of the Fifth Amendment privilege against self-incrimination, the act of production must be considered in its own right, separate from the documents sought. And even production that is of a testimonial nature can be compelled if the Government can demonstrate it already knows the information that act will reveal -- if, in other words, the existence of the requested documents, their authenticity, and the defendant's possession of and control over them -- are a **"foregone conclusion."**

subpoena...[but] rather, the testimony inherent in the act of producing those documents" and "the testimonial aspect of a response to a subpoena duces tecum does nothing more than establish the existence, authenticity, and custody of items that are produced;" concluding that the government had failed to demonstrate any independent knowledge of that information).

Andrews, 2020 WL 4577172, at *13 (emphasis in original).

The Supreme Court of New Jersey found that a cellphone's passcode is analogous to the combination to a safe and that *communicating or entering* a passcode requires facts contained within the holder's mind and is a testimonial act of production. However, it continued:

The inquiry does not end there, however, because, if the foregone conclusion exception applies, production of the passcodes may still be compelled. To determine the exception's applicability, we must first determine to what it might apply -- the act of producing the passcodes, or the act of producing the cellphones' contents through the passcodes. To be consistent with the Supreme Court case law that gave rise to the exception, *we find that the foregone conclusion test applies to the production of the passcodes themselves, rather than to the phones' contents.*

The relevant Supreme Court cases explicitly predicate the applicability of the foregone conclusion doctrine on the fundamental distinction between the act of production and the documents to be produced. The documents may be entitled to no Fifth Amendment protection at all -- and, indeed, they were not so entitled in Fisher -- but the act of

producing them may nevertheless be protected.

Id. at *17 (emphasis added).

This determination that the foregone conclusion exception applies to the production of the passcodes rather than to the phones' contents directly conflicts with the majority's determination in *Davis*.

The Supreme Court of New Jersey also expressed disagreement with the *Davis* majority's decision to import Fourth Amendment privacy principles into what is properly a Fifth Amendment analysis, noting that this Court in *Fisher* rejected such importation when it rejected "the rule against compelling production of private papers" previously established in *Boyd v. United States*, 116 U.S. 616 (1886) which rested on the proposition that seizures of or subpoenas for "mere evidence" violated the Fourth Amendment and therefore also transgressed the Fifth. *Id.* The Court held that:

In light of the stark distinction the [United States Supreme] Court has drawn between the evidentiary object and its production -- a division reinforced even in those cases where the foregone conclusion exception was held not to apply -- it is problematic to meld the production of passcodes with the act of producing the contents of the phones. As the Davis dissent observed, that approach imports Fourth Amendment privacy principles into a Fifth Amendment inquiry.

* * *

...We agree with the Davis dissent that the proper focus here is on the Fifth Amendment and that the Fourth Amendment's privacy protections should not factor into analysis of the Fifth Amendment's applicability.

Id.

Ultimately, the Supreme Court of New Jersey affirmed the trial court's order compelling production of the passcodes based on an interpretation of this Court's precedent that directly contradicts the reasoning of the Supreme Court of Pennsylvania majority opinion in *Davis*:

In sum, we view the compelled act of production in this case to be that of producing the passcodes. Although that act of production is testimonial, we note that passcodes are a series of characters without independent evidentiary significance and are therefore of "minimal testimonial value" – their value is limited to communicating the knowledge of the passcodes. Thus, although the act of producing the passcodes is presumptively protected by the Fifth Amendment, its testimonial value and constitutional protection may be overcome if the passcodes' existence, possession, and authentication are foregone conclusions.

Based on the record before us, we have little difficulty concluding that compelled production of the passcodes falls within the foregone conclusion exception. The State established that the passcodes exist – they determined the cellphones’ contents are passcode-protected. Also, the trial court record reveals that the cellphones were in Andrews’s possession when seized and that he owned and operated the cellphones, establishing his knowledge of the passcodes and that the passcodes enable access to the cellphones’ contents. Finally, to the extent that authentication is an issue in this context, the passcodes self-authenticate by providing access to the cellphones’ contents.

The State’s demonstration of the passcodes’ existence, Andrews’s previous possession and operation of the cellphones, and the passcodes’ self-authenticating nature render the issue here one of surrender, not testimony, and the foregone conclusion exception to the Fifth Amendment privilege against self-incrimination thus applies. Therefore, the Fifth Amendment does not protect Andrews from compelled disclosure of the passcodes to his cellphones.

Id. at *18 (emphasis added) (citations and footnotes omitted).

In light of the foregoing, Respondent's argument to this Court in opposition to the Petition for Writ of Certiorari has been conclusively refuted. *The Supreme Court of Pennsylvania has decided an important federal question in a way that directly conflicts with the decision of the Supreme Court of New Jersey on the same federal question.* The confusion arising out of these starkly conflicting decisions as well as disparate and inconsistent decisions of other state and federal appellate courts regarding the applicability of the foregone conclusion doctrine in the context of compelled production of passwords to encrypted electronic devices is bound to grow exponentially with the passage of time. This is due to the ubiquitous nature of electronic communication and storage devices and the increasing frequency with which law enforcement agencies are confronted with emerging digital technologies that prevent them from conducting lawful searches that are critically important to the public's paramount interest in law enforcement and public safety.

This Honorable Court's guidance on this subject and clarification regarding how the relevant Fifth Amendment principles apply in this context is desperately needed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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