No. 19-6154 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Joanthony Deaundre Johnson — PETITIONER
(Your Name)

vs.

State Of Missouri — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Missouri Court Of Appeals, Western District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joanthony Deaundre Johnson
(Your Name)

South Central Correctional Center, 255 West Highway 32
(Address)

Licking, MO 65542
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

1. Whether a warrant authorizing the search of a cell phone and describing the things to be seized as "all data/software" pertaining to the crimes is offensive to the Fourth Amendment's particularity requirement?

2. Whether compelling an individual whom a search is being directed against to furnish a decrypted cell phone in a criminal case is offensive to the Fifth Amendment's assurance that no person shall be compelled to be a witness against himself?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joanthony D. Johnson respectfully petitions for a writ of certiorari to review the judgments of the Missouri Court of Appeals, Western District, in case WD80945.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is reported at State v. Johnson, 576 S.W.3d 205 (Mo. App. 2019). The order of the Supreme Court of Missouri denying review (Pet. App. 1e) is unpublished. The relevant trial court proceedings and order are unpublished.

JURISDICTION

The Supreme Court of Missouri denied review on June 25, 2019 (Pet. App. 1e). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(A).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment states: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment states in relevant part: "No person... shall be compelled in any criminal case to be a witness against himself[.]"

STATEMENT OF THE CASE

The affidavit in support of the application for a warrant to search petitioner's apartment for evidence of felony drug possession, delivery, or manufacture of a controlled substance, and first-degree rape, recited three alleged incidents on three dates. Ex.1.4. The trial court issued a search warrant for petitioner's apartment on February 19, 2016, authorizing law enforcement to seize all cell phones and permitting off-site searches of seized devices for "all data/software as defined by RSMO556.064[.]" Ex.1.4. The warrant was executed and an iPhone was seized from the apartment. Ex.1.4., Tr.329,1105. The iPhone was locked and unsearchable. Tr.330.

The parties appeared before the trial court on October 24, 2016 for a pretrial conference ahead of a November 1, 2016 trial setting proceeding on the First Amended Information, charging petitioner with first-degree rape of M.V. and possession with intent to distribute both more than five grams of marijuana and psilocin. Tr.35 L.F.61-62. The prosecutor advised the trial court that police investigator Jeff Adams was going to St. Louis to observe defense expert, Greg Chatten's, attempt to perform an extraction. Tr.34,41. It was Adam's understanding that the analysis by [Chatten] could erase the iPhone. Tr.41,43-44. If the "User Lock Recovery Tool" on Cellbrite forensic imaging technology was used on the seized iPhone, it "would lock it out and erase all content and settings" after ten attempts. Tr.332,365. Defense counsel understood that there were not "any stipulations entered into court regarding that specific piece of evidence if it is, in fact, wiped clean

as to what may have been or not been on that device." Tr.45. The prosecutor acknowledged "we were going to proceed with nothing from the phone[ ]" and was prepared to "proceed without knowing what was in the phone[]" at the forthcoming trial. Tr.45,111, 132-33,140-41.

The St. Louis extraction did not take place, since Chatten was threatened by law enforcement. Tr.103,360-62,381. Adams understood Chatten would be subject to criminal charges for destruction of evidence if he proceeded with the extraction attempt. Tr.362. Defense counsel arranged with the prosecutor to make the iPhone available at the Boone County jail. Tr.99. Defense counsel wanted to protect Chatten from prosecution. Tr.390.

On October 28, 2016, the parties had an "agreement" that law enforcement would make the phone available and Chatten could attempt to perform an extraction at the jail, so long as it was "video-recorded and then that Jeff Adams from Columbia Police Department... could do his extraction." Tr.98-99,103-104. After Chatten's attempt, the state would do their extraction. Tr.110. The prosecutor did not want petitioner handling the iPhone, but agreed to allow him to use his thumbprint to access the phone for Chatten. Tr.110. The prosecutor believed the terms were such that petitioner "further must agree to use his thumbprint to... make it so our expert could do his extraction[.]" Tr.99. The threat of Chatten's prosecution drove this "agreement" because Chatten "freaked out and wanted some various assurances." Tr.141, 389-90.

On that day, petitioner, trial counsel, Chatten, Adams, and Corcoran

met at the jail. Tr.98,333.,Ex.1.1. Petitioner's thumbprint could not be used to unlock the iPhone. Tr.337. The only way to access the iPhone was through its passcode. Tr.108. Adams presented the cornered, handcuffed petitioner with the iPhone and petitioner entered a passcode, unlocking the phone. Tr.334., Ex.1.1. Chatten then began his extraction for petitioner, during which the iPhone auto-locked. Tr.99-101,334., Ex.1.1. This required the passcode to be reentered. Tr.334. Adams presented petitioner with the iPhone again and requested petitioner reenter the passcode so the government could do its extraction, which petitioner refused. Tr.104,334. Upon Petitioner's refusal, the parties had a telephonic hearing with the trial court. Tr.98. The prosecutor orally moved to compel petitioner to enter his passcode into the phone to permit the government's analysis. Tr.104. Petitioner's objection to the state's motion to compel was to unlocking the phone. Tr.107. Neither trial counsel nor the prosecution contemplated either the phone locking or petitioner entering his passcode as part of any good faith "agreement". Trial counsel argued that the government requiring petitioner to enter his passcode was compelling self-incrimination. Tr.104-105,111.

Law enforcement intended to seize Chatten's computer if the trial court did not compel petitioner to enter his passcode. Tr.113,362. Chatten would have been detained and arrested if he tried to leave with his computer after petitioner refused to enter his passcode. Tr.363. Prosecutor moved to compel petitioner because "when he put in that code, he made it so they could actually perform the extraction." Tr.107. The prosecutor wanted the trial

court to "compel [petitioner] to basically uphold this agreement and allow us to perform our extraction" because "the only way they can get in is with the code." Tr.108. The trial court stated petitioner was bound by the agreement between counsel. Tr.110. The trial court ordered petitioner to enter his passcode, stating it was"[b]ased on prior agreement of counsel for the parties[.]" Tr.104,115-116. Petitioner complied with the trial court's order and reentered his passcode. Tr.342., Ex.1.1. Adams did a complete "dump" of all data on the iPhone. Tr.325-26,343,1279-80., Ex.1.2. Two days after the data extraction, the state filed a motion to continue the November, 2016 trial setting. L.F.63-64. This motion averred Adams and Corcoran had preliminarily reviewed the extraction for relevant evidence and this leads the state to believe petitioner's crimes are serial in nature. L.F.63., Tr.130. The government sought a continuance for further investigation into identifying potential victims and witnesses to additional criminal activity. L.F.63. The government believed these potential "victims and witnesses may be able to recognize [petitioner], place themselves in his presence and perhaps in his residence, and identify themselves in photographs and videos thereby establishing additional criminal conduct committed by [petitioner]." L.F.63-64. "[T]he type of evidence located requires additional time to analyze, to establish possession, and to determine whether it was altered or distributed in any way." L.F.64., Tr.130. The government acknowledged that this "other information" retrieved from the phone wasn't necessarily additional criminal activity but possibly additional criminal activity. Tr.137. The trial court sustained the government's motion. Tr.144. The identity

of the persons in the videos were unknown. Tr.1316. Adams conducted an investigation in regards to the videos and analyzed text messages and call logs on the dates surrounding the creation of the videos. Tr.1319,1331. Petitioner filed a "Motion to Suppress Physical Evidence" alleging in part "the search was not conducted in a reasonable manner and the property seized was not described in the warrant[.]" L.F.79-80.

Prior to a hearing on the motion to suppress, the state filed a five-count amended indictment eliminating the previously-charged drug possession/distribution counts and adding four new counts with three new alleged victims. Supp.L.F.1-4.

At the hearing on the motion to suppress, trial counsel clarified that the motion was also a challenge to the court's order for petitioner "to unlock cellphone by use of his personal code[.]. Tr.299. Adams testified that he observed and recorded petitioner's passcode entry as he stood over petitioner prior to Chatten's extraction and prior to the prosecutor's request for an order to compel petitioner's reentry of the passcode after the phone locked up. Tr.338. Adams further testified that part of the contents of a phone download is the actual passcode which confirmed what he wrote down was correct. Tr.343. Defense counsel requested to exclude the videos, text, and investigations into other potential criminal conduct. Tr.374-375. The prosecutor asserted that petitioner waived his Fifth Amendment privilege pursuant to the agreement between counsel. Tr.321. Defense counsel argued petitioner gave his consent through her but didn't know to what he was agreeing

to. Tr.318,386. Defense counsel further argued any consent can be withdrawn. Tr.319. The court agreed that consent can be withdrawn. Tr.319.

The trial court denied the motion after hearing. Pet. App.1c-3c. The court found the foregone conclusion exception negated petitioner's Fifth Amendment claim. Pet. App. 3c. The court further found that petitioner's desire to have his own expert examine the phone and the discussions between petitioner's counsel and the state regarding the logistics of the cell phone examination established "the state was aware with reasonable particularity that the cell phone included relevant evidence[.]" Pet. App. 3c. The trial court said of petitioner's challenge to the February 19, 2016 warrant's scope, "the search warrant properly permitted a search of the contents of the cell phone." Pet. App. 1c.

At trial, trial copnsel was granted a continuing objection "with respect to the cell phone and the contents of the cell phone." Tr.1278. The jury convicted petitioner on all counts as charged. Tr.2052-53. Petitioner was sentenced to a total of one hundred years imprisonment. Pet. App. 1b-5b. The motion for a new trial was denied. Tr.2063.

The Missouri Court of Appeals affirmed peitioner's convictions. Pet. App. 1a-44a. As is relevant here, the appeals court determined "[u]nder the circumstances, the scope of the warrant was sufficiently particular and not overbroad" because it "constrain[s] the search of [petitioner]'s phone to evidence of specific crimes." Pet. App. 26a. The appeals court also determined "the compelled act of production was not testimonial and not protected by the Fifth Amendment privilege against self-incrimination, and it could

not become so simply because it led to incriminating evidence." Pet. App. 36a.

Petitioner sought discretionary review in the Supreme Court of Missouri. As is pertinent here, petitioner renewed his argument that the court's holding regarding the breadth and particularity of the issued search warrant endorses a general warrant. Petitioner also renewed his argument that the court erred in holding the "foregone conclusion" doctrine denied petitioner Fifth Amendment protection. The Supreme Court of Missouri denied review. Pet. App. 1e.

REASONS FOR GRANTING THE WRIT

Do the Fourth and Fifth Amendment overlap as coequal amendments or do they dwell in splendid isoaltion? Do both cower in the presence of a search warrant on the "privacies of life" or do they come together to protect individuals from "illegitimate and unconstitutional practices" and "stealthy encroachments thereon"? The questions presented in petitioner's case are intertwined in such a way that petitioner asks, what lower courts and commentators have asked for years, is Boyd v. United States, 116 U.S. 616 (1886) still good law?

Federal courts and state courts are openly divided on the proper measure of particularity in warrants issued to search electronic devices post Riley v. California, 573 U.S. 373 (2014). While the admonition for police to "get a warrant" was this Court's "simple" answer to cell phone searches, there has been an open divide among lower courts as to whether the Fourth Amendment's

particularity guarantee must apply with equal force to cell phone searches as it does to searches pf physical spaces and to what extent. Some courts have reasoned that this Court was deliberately invoking its precedent requiring scrupulous particularized descriptions in warrants authorizing the search of digital devices by drawing the comparison of such a search exceeding "the most exhaustive search of a house." Other courts have reasoned that this Court's discussion of the characteristics of cell phones and privacy interest in no way was an expression of any opinion on, nor offered any suggested guidance as to what characteristics were required of a valid warrant to seize and search a cell phone under constitutional and statutory law. The Court should use this case to resolve the struggle between the lower courts in determining the particularized scope of cell phone searches and ensuring such searches do not devolve into the reviled general warrants the Fourth Amendment's particularity requirement was designed to prevent, thereby protecting the people against unreasonable generalized rummaging into the privacies of life.

The conflict over the scope of protection the Fourth Amendment affords to cell phones and the privacies of life under both the particularity and reasonableness requirements arises from divergent threads in this Court's precedent and uncritical extensions of existing precedent by way of crude, over simplistic analogies to other physical objects.

Such a gross oversimplification was evident as the court in United States v. Bishop, 910 F.3d 335,337 (7th Cir. 2018) analogized a cell phone to a filing cabinet in a lawyer's office.

The Bishop court reasoned that modern cell phones are comparable to filing cabinets one would have kept in his work place in 1976. Per this Court's discussion in Riley, such an analogy is inept. Moreover, a closer reading of the case the Bishop court uses to apply the analogy compels a different result. See Andresen v. Maryland, 427 U.S. 463,479-82 (1976). The filing cabinet in Andresen was inconsequential to the focus of the government's search. The government sought specifically listed categories of documents and papers and the place to be searched was Andresen's office and not limited to just filing cabinets that happened to be there. The proper analogy the Bishop court should have adapted would have been comparing a modern cell phone to Andresen's entire law office. See Andresen, 427 U.S. at 482 n.11., See also State v. Mansor, 421 P.3d 323,338-43 (Ore. 2018) (rejecting the state's argument that a computer is merely a "thing" and applying the particularity requirement of "things to be seized" to the computer's contents).

This Court held in Andresen that because what was "[u]nder investigation was a complex real estate scheme" the "complexity of an illegal scheme may not be used to shield detection." Andresen, 427 U.S. at 463. This Court held the seizure of business records was constitutional based on the warrants language allowing a seizure of listed items. Id. at 479. Lower courts have thus followed this Courts precedent. See United States v. Maali, 346 F. Supp. 2d 1226,1239-45 (M.D. Fla. 2004) (holding warrants were neither impermissibly broad nor insufficiently particular even where they have called for the seizure of many categories of items).

Courts have continued to apply Andresen's reasoning in the context of digital searches as well. See United States v. Chaney, 921 F.3d 572,585-89 (6th Cir. 2019) (holding in some circumstances, a warrant that empowers police to search for something satisfies the particularity requirement if its text constrains the search to evidence of a specific crime); United States v. Castro, 881 F.3d 961 (6th Cir. 2018) (same). These cases involved warrants which, although lengthy and broadly worded, contained specific and particular items or categories of items to be seized. The warrant in Andresen didn't authorize a seizure of the "privacies of life", but only specific items related to a complex scheme. The Missouri appeals court in Petitioner's case reasons that Petitioner's reliance on United States v. Wey, 256 F. Supp. 3d 355,385-88 (S.D.N.Y. 2017), United States v. Winn, 79 F. Supp. 3d 904,918-22 (S.D. Ill. 2015), and State v. Henderson, 854 N.W.2d 616,634 (Neb. 2014) in support for the lack of particularity in the issued warrant were all unpersuasive. Pet. App. 24a. The appeals court adopted the flawed analogy of Bishop and misconstrued both the language of the cases on which it relies and the spirit of the Fourth Amendment. Although the Bishop court's reasoning was flawed, the warrant at issue there described things to be seized. Bishop, 910 F.3d at 336. The two other cases the appeals court relied on to deny petitioner his right to be secure against unreasonable searches also listed specific items, People v. English, 52 Misc. 3d 318, 320 (N.Y. Sup. Ct. 2016) and United States v. Bass, 785 F.3d 1043,1050.(6th Cir. 2015). Accordingly, none of its cited cases support the rule the appeals court opinion

espoused here and thus a warrant to search "all data/software" is a general warrant.

"The description does not actually describe anything. It does not provide guidelines to assist an executing officer in knowing what he was looking for or how to identify it." Clark v. Bridges, 211 F. Supp. 3d 731,746 (D. S.C. 2016) (quoting United States v. LeBron, 729 F.2d 533,539 [8th Cir. 1984]). The reference to "all data/software" just narrowed the list of prospectively "seizable" items to a set of unnamed, unidentified data putatively connected to the alleged offenses in petitioner's case. "While... '[a] warrant need not... scrupulously list and delineate each and every item to be seized[,]' United States v. Phillips, 588 F.3d 218,255 (4th Cir. 2009), it does not follow that a complete sense of specificity with regard to items sought is excusable." Clark, 211 F. Supp. 3d at 748.

This Court has held that "[t]he text of the Fourth Amendment expressly imposes two requirements. First, all warrants must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity". Kentucky v. King, 563 U.S. 573,584 (1980). The warrant must clearly state what is sought and "[f]ailure to adequately enforce the particularity requirement would undermine the warrant requirement itself, and increase the risk of an excessive intrusion into the areas of personal rights protected by the Fourth Amendment". United States v. Wuagneux, 683 F.2d 1343,1348-49 (11th Cir. 1982). The particularity requirement is meant to ensure that citizens are not subjected

to "a general, exploratory rummaging in [their] belongings," Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971), and "as to what is to be taken, nothing is [to be] left to the discretion of the officer executing the warrant," Marron v. United States, 275 U.S. 192,196 (1927).

A search of "all data" on a cell phone is a search through all the privacies of life. "[V]irtually the entirety of a person's life may be captured as data[.]" United States v. Ganias, 824 F.3d 199,217 (2nd Cir. 2016). Describing data as the thing to be seized in relation to some alleged offense does not provide the requisite protection against a generalized search for data is as much of a thing in a phone as atoms are things ina home. "In other words, search warrants should not be deemed invalid simply because the officer(s) obtaining the warrant cannot perfectly anticipate all of the contraband they may find during the course of the search. But again, this does not excuse a complete absence of any descriptive detail to guide an officer's actions when executing the search." Clark, 211 F. Supp. 3d at 748.

Some courts have upheld "all data" searches. See People v. Watkins, 994 N.Y.S.2d 816 (N.Y. Sup. Ct. 2014); Moore v. State, 160 So. 3d 728 (Miss. Ct. App. 2015); Commonwealth v. Zdrahal, 122 A.3d 1132 (Pa. Super. Ct. 2015); and Hedgepath v. Commonwealth, 441 S.W.3d 119 (Ky. 2014). Yet this Court has invalidated a warrant for not particularly describing a home in a search warrant. Groh v. Ramirez, 540 U.S. 551,557 (2004). Do the "things" to be seized deserve the same proportionally detailed description as the "place" to be searched? These "all data" warrants,

including Petitioner's, authorize top to bottom searches on the privacies of life. Some "would not read the Fourth Amendment and its particularity requirement, to allow such a search." Moats v. State, 168 A.3d 952,966-67 (Md. 2017). See also Adam M. Gershowitz, The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches, 69 Vand. L. Rev. 585, 601-06 (2016) (discussing the particularity in search warrants for cell phones).

Courts have further rejected the idea that merely mentioning the crime when conducting a search of a phone(or a comparable electronic device) can substitute the need for warrants to particularly describe the items to be seized. State v. McKee, 413 P.3d 1049, 1056-57 (Wash. Ct. App. 2018), rev'd on other grounds, State v. Mckee, 438 P.3d 528 (Wash. 2019); Mansor, 421 P.3d at 345; State v. Castagnola, 46 N.E.3d 638,656 (Ohio 2015). Indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment". Payton, 445 U.S. at 583. Those general warrants "specified only an offense," leaving "to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched." Steagald v. United States, 451 U.S. 204, 220 (1981). Warrants should "provide[] sufficient information to "guide and control" the judgment of the executing officer in what to seize. United States v. Upham, 168 F.3d 532,535 (1st Cir. 1999). A search with the determination of what to seize within the discretion of the executing officer "fails to conform to the particularity

requirement of the Fourth Amendment [and] is unconstitutional". Massachusetts v. Sheppard, 468 U.S. 981, 988 (1984). The Tenth Circuit found a warrant which did not specify what material (e.g. text messages, photos, or call logs) law enforcement was authorized to seize as failing to meet the particularity requirement. United States v. Russian, 848 F.3d 1239,1245 (10th Cir. 2017). "[C]ourts have insisted that warrants for a digital storage device provide a reasonably specific description of the material that the police can search for within the device." Pohland v. State, 436 P.3d 1093,1100-01 (Alas. App. 2019)(finding troopers exceeded the boundriesof a reasonable search given the warrant's description of what could be seized). Courts have found cell phone warrants which were vague regarding the information sought and authorizing searches of materials for which there was no probable cause also to be lacking in particularity. See e.g. Buckham v. State, 185 A.3d 1,19 (Del. 2018)(holding warrants issued to search electronic devices call for particular sensitivity in light of the enormous potential for privacy violations posed by unconstrained searches and striking down a warrant that authorized the police to search "any and all stored data" of a defendant's cell phone for evidence of a shooting). Cell phone search warrants should set parameters and "limit the search to only the content that is related to the search" by "identifying the locations on the cell phone to be searched and the content to be seized." State v. Goynes, 927 N.W.2d 346,355-57 (Neb. 2019). The particularity requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide ranging exploratory searches the

Framers intended to prohibit." Maryland v. Garrison, 480 UsS. 79,84 (1988). "The ultimate touchstone of the Fourth Amendment is reasonableness." Brigham City v. Stuart, 547 U.S. 398,403 (2006). The Supreme Court of Colorado rejected a search of all data on a cell phone for "indicia of ownership" because it would authorize a general search of the entire contents of the phone "transforming the warrant into a general warrant that fails to comply with the Fourth Amendment's particularity requirement." People v. Herrera, 357 P.3d 1227,1230-31 (Colo. 2015). "Where the search does not meet the traditional requirements of the Fourth Amendment doctrine, it should not be permitted." Id. at 1234. General warrants, traditionally, gave government agents unlimited authority to search and seize. See Laura K. Donohue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181 (2016) (describing the development of the Fourth Amendment as a response to genral warrants). The government generally conducted indescriminate searches throughout Petitioner's cell phone and if a warrant properly permits a general search, it too must be general. General warrants were important enough to the public two-hundred years ago for the framers to develop the Fourth Amendment in opposition to them, shouldn't they be equally important to the public today to ensure such warrants do not return and erode the framers intent?

The purpose of the Fourth Amendment "is to safeguard the privacy of individuals against arbitrary invasions of government officials." Camara v. Municipal Court of San Francisco, 387 U.S. 523,528 (1981). One court has recognized the privacy interest underlying

the Fourth Amendment and "conclude[d] that the state should not be permitted to use information obtained in a digital search if the warrant did not authorize the search for that information[.]" Mansor, 421 P.3d at 344-45 (citing Orin Kerr, Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data, 48 Tex. Tech L. Rev. 1,24 [2015]). The Mansor Court reasoned that privacy rights ensured by the Fourth Amendment barred the state from using evidence that was not particularly described in the warrant in part to "prohibit[] general warrants that give the bearer an unlimited authority to search and seize." Id. at 345. If the purpose of the particularity requirement was to protect the privacies of life and privacy in general, may the government conduct limitless indiscriminate searches through cell phones data? Such searches will invariably and inevitably beget police rationalizing post hoc on the things seized. Messerschmidt v. Millender, 565 U.S. 535,568 n.8 (2012). Maybe the Self-Incrimination Clause is best suited to protect privacy in the digital age. This Court has found that clause "enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." Griswold v. Connecticut, 381 U.S. 479, 484 (1965). "The law and the lawyers... have never made up their minds just what [the privilege against self-incrimination] is supposed to do or just whom it is intended to protect." Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52,56 n.5 (1964).

The majority of Federal and state courts have held that the compelled use of a passcode to furnish a decrypted device is in fact a

testimonial communication falling under the Fifth Amendment's protection against compelled self-incrimination. However, the lower courts are openly divided among the use of the "foregone conclusion" doctrine to nonetheless permit the use of evidence that would be obtained through that production. This Court should use this case to resolve the conflict among the lower courts regarding the Fifth Amendment's scope pf protection in the production of decrypted devices, as it is Petitioner's fear the foregone conclusion exception will swallow the Fifth Amendment's privilege, both in the application of the act-of-production doctrine and the original meaning of the Self-Incrimination Clause.

Encryption is a form of protection, used to shield the privacies of life from others. With all a cell phone may reveal, "[t]he sum of an individual's private life" (Riley, 573 U.S. at 393-94), it is understandable why such a feature is essential. All of one's business, medical, and intimate information can be placed on a cell phone and accordingly all protection is eviscerated and the privacies revealed once the phone is decrypted. The conflict over the scope of protection the Fifth Amendment affords to individuals being compelled to furnish decrypted cell phones and their privacies of life under a subpoena again arises from divergent threads in this Court's precedent and the uncritical extension of existing precedent by way of crude, over-simplistic analogies to other physical objects.

Lower courts considering the scope of the Fifth Amendment regarding the production of decrypted digital devices are split on whether the focus of the foregone conclusion exception is on the government's

knowledge of what physical evidence is produced by production or the government's knowledge of the defendant's ability to produce said evidence. Some argue that the foregone conclusion analysis properly focuses on whether an individual's ability to unlock a particular device is a foregone conclusion only. See State v. Stahl, 206 So.3d 124,136 (Fla. Dist. Ct. App. 2016); Commonwealth v. Davis, 176 A.3d 869,876 (Pa. Super. Ct. 2017), appeal granted, 195 A.3d 557 (Pa. 2018; State v. Andrews, 197 A.3d 200,207 (N.J. Super. Ct. App. Div. 2018), leave to appeal granted, 206 A.3d 964 (N.J. 2019); United States v. Spencer, 2018 WL 1964588 at *3 (N.D. Cal. Apr. 26, 2018); Commonwealth v. Jones, 117 N.E.3d 702,714-15 (Mass. 2019). The appeals court in Petitioner's case follows these courts reasoning in concluding the only facts conveyed in producing a decrypted phone were facts surrounding the existence, possession, and authenticity of the phone's passcode. Pet. App. 34a-36a. See Stahl, 206 So.3d at 136 ("The question is not the State's knowledge of the contents of the phone; the state has not requested the contents of the phone"). The Massachusetts Supreme Court reached the same conclusion in deciding the defendant's knowledge of the password was a foregone conclusion and not subject to the protections of the Fifth Amendment simultaneously eviscerating the privilege in compelling all of the devices decrypted data. Jones, 117 N.E.3d at 711.

Other courts argue because documents are synonymous to files protected digitally, the proper focus of the foregone conclusion doctrine is on the digital contents produced. See United States v. Apple Macpro Computer, 851 F.3d 238,247 (3rd Cir. 2017);

United States v. Bright, 596 F.3d 683,692 (9th Cir. 2010); In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011, 670 F.3d 1335,1346 (11th Cir. 2012); Seo v. State, 109 N.E. 3d 418, 425-31 (Ind. Ct. App. 2018), transfer granted, 119 N.E.3d 90 (Ind. 2018); G.A.Q.L. v. State, 257 So.3d 1058,1063 (Fla. Ct. App. 2018); SEC v. Huang, 2015 WL 5611644 at *3 (E.D. Pa. Sept. 23, 2015); People v. Spicer, 125 N.E.3d 1286,1290-92 (Ill. Ct. App. 2019); In re Application for a Search Warrant, 236 F. Supp. 3d 1066 (N.D. Ill. Feb. 16, 2017); In re Search of a Residence in Oakland, 354 F. Supp. 3d 1010,1016-17 (N.D. Cal. 2019). These courts have found that the government doesn't seek "decryption for its own sake, but for the purpose of obtaining the files protected by encryption." G.A.Q.L., 257 So.3d at 1062 (quoting In re Grand Jury Subpoena, 670 F.3d at 1346). Courts have found the use of a passcode to unlock and decrypt as a means of production. See In re Application for a Search Warrant, 236 F. Supp. 3d at 1073; G.A.Q.L., 257 So.3d at n.1. Courts have further rejected the idea that "provid[ing]... access [to] documents and data is synonymous with producing documents pursuant to a subpoena[.]" In re Search of a Residence in Oakland, 354 F. Supp. 3d at 1017. These courts have considered "that the proper focus [of the foregone conclusion exception] is not on the passcode but on the information the passcode protects." Spicer, 125 N.E.3d at 1291.

This Court considered a motion to compel the production of an accountant's documents in the possession of a taxpayer's attorney in Fisher v. United States, 425 U.S. 391 (1976). This Court held the taxpayer's Fifth Amendment privilege was not implicated

in response to his Fifth Amendment challenge because "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 the he in fact has the papers." Fisher, 425 U.S. at 411. This Court addressed a similar issue in regards to the production of eleven categories of documents and "the existence of the evidence demanded, the possession or control of such evidence by the individual, and the authenticity of the evidence." United States v. Hubbell, 530 U.S. 27,36 (200). This Court reached a different conclusion about the government's request, labeling it a "fishing expedition" and holding defendant's response was not a foregone conclusion because the government did not have prior knowledge of the existence or whereabouts of the 13,120 pages of documents that it requested. Id. at 44-45. This Court also noted that the inquiry was not whether the content of the documents was testimonial, but whether the act of producing documents was testimonial. Id. at 40. Thus, the only cases this Court has decided with regards to the foregone conclusion have been these in which a defendant was asked to produce physical evidence. See Andrew T. Winkler, Password Protection and Self-incrimination: Applying the Fifth Amendment Privilege in the Technological Era, 39 Rutgers Computer and Tech. L.J. 194, 211-12 (2013). This Court has never applied the exception to anything other than paper business documents and cautioned against applying it to more private information like a personal diary as such compulsion might present "[s]pecial problems of privacy[.]" Fisher, 425 U.S. at 401 n.7 (citing United States v. Bennet, 409 F.2d 888,897 (2nd Cir. 1969).

The appeals court in Petitioner's case reasons the only testimony implicit in the act of producing a decrypted phone is the phone's passcode. This leads Petitioner to believe that the testimony implicit may in fact be subjective. See Laurent Sacharoff, Unlocking the Fifth Amendment: Passwords and Encrypted Devices, 87 Fordham L. Rev. 203,236-37 (2018). Petitioner's case presents this Court with the opportunity to decide how the foregone conclusion doctrine should be applied to digital evidence. Consider physical documents, which are protected under the Fifth Amendment's act-of-production doctrine, being placed on digital devices. Would Hubbell not have had the same privilege had he merely stored his documents on his phone rather than in his closet? Assuming the government has seized Hubbell's phone, but have not yet seized the data protected by encryption, to compel Hubbell to decrypt and surrender would be requiring him to reveal the documents existed, were in his control, and were authentic. Hubbell, in such a scenario, would be "the individual against whom the search is directed" and "required to aid in the discovery, production, or authentication of incriminating evidence." Andresen, 427 U.S. at 473-74. Such a compelled act of production would be analogous with the physical production of the same material and be a disclosure Hubbell could "reasonably believe[] could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441,444-45 (1972). To furnish a decrypted cell phone could "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Hoffman v. United, 341 U.S. 479,486 (1951).

Another important divide among the lower courts is whether the contents of phones deserve Fifth Amendment protection. Some have adopted the faulty analogy of comparing the "content" of a document as discussed in Hubbell to the "contents" of a phone as discussed in Riley. Some courts have declared the two as synonymous but one cannot reasonably beleive the content of a document is comparable to the contents of a cell. Under this Court's precedent "[a] search of the information on a cell phone bears little resemblance to the type of brief physical search considered [in prior precedents]." Riley, 573 U.S. at 386. It wouldn't be necessary to look beyond this Court's most recent discussion regarding cell phones to conclude that the contents of a cell phone aren't necessarily voluntarily created either. Carpenter v. United States, 138 S. Ct. 2206,2220 (2018) (explaing how any activity on a phone creates location data and there being no way to avoid leaving behind a trail of location data). See Josh Goldfoot, The Physical Computer and the Fourth Amendment, 16 Berkeley J Crim L 112,127-28 (2011) (discussing data that devices create which aren't apparent to casual users). Such an "unknowable" category of information allowing the "[g]overnment to go back in time to retrace a person's whereabouts" should surely deserve more protection than Fisher's tax documents. Carpenter, 138 S. Ct. at 2218. Allowing the government to use such a compulsory process to inform itself of this "unknowable" information would be "call[ing] upon the results of [] surveillance without regard to the constraints of the [Fifth] Amendment." Id. at 2218. "It is extortion of information from the accused himself that offends our sense of justice." Couch v. United States,

409 U.S. 322,328 (1973). Such an interpretation of the foregone conclusion rationale espoused by the appeals court in Petitioner's case, if adopted, would "contravene[] the protections of the Fifth Amendment." G.A.Q.L., 257 So.3d at 1063.

Imagine recognizing a Fifth Amendment privilege for a witness facing compulsion to testify being present at the scene of a crime. See Resnover v. State, 507 N.E.2d 1382,1389 (Ind. 1987) (recognizing a Fifth Amendment privilege when asked on the stand if she was present at the crime scene as the answer may be incriminating as it places her in danger of being implicated in the crime). Shouldn't the same witness be able to refuse the call of the government by way of subpoena of that same information involuntarily created and secreted on her phone? The "[government]'s access to and use of the [phone] would go a long way to establishing defendant's possession of the [phone] at the critical time." Goldsmith v. Superior Court, 152 Cal. App. 3d 76,87 (1984) (finding the prosecution's attempt to procure a gun to "inspect, examine, and test[]" would be using evidence derived from production to establish defendant's guilt for the crimes charged and would be a "blatant constitutional invasion"). One jurist has aptly noted that compelled decryption without the government demonstrating knowledge of incriminating content would "sound[] the death knell for [] constitutional protection against compelled self-incrimination in the digital age." Jones, 117 N.E.3d 724 (Lenk, J., concurring in result). Must one cower in the presence of a search warrant and cede all privacies to assist the government in his own demise?

What is the scope and meaning of the Self-Incrimination Clause? "[O]ne cardinal rule of the court of chancery was never to decree a discovery which might tend to convict the party of a crime." Boyd, 116 U.S. at 631. "It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, or forfeitures." Counselman v. Hitchcock, 142 U.S. 547, 563-64 (1892). This Court's previous rulings seemingly conflict with the court of appeals decision in Petitioner's case. Was the original purpose of privilege to protect citizens from turning over potentially incriminating evidence? The values protected by the Fourth Amendment... substantially overlap those the Fifth Amendment helps to protect." Schmerber v. California, 384 U.S. 757,767 (1966). The 18th century guarantees against unreasonable searches and the privilege against self-incrimination should not allow the "reviled general warrant" to resurface and permit indiscriminate searches and quintessential fishing expeditions. The appeals court ruling that the search and seizure pf Petitioner's phone was lawful would mean "the secret cabinets and bureus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenver the secretary of state shall think fit to charge, or even suspect, a person to be author, printer, or publisher of a seditious libel." Entick v. Carrington, 19 How. St. Tr. 1029,1063-64 (1765). "[S]uch a power would be more pernicious to the innocent than useful to the public..." Id. at 1073. It is unlikely the framers of the Fourth and Fifth Amendments would have been able to anticipate

cell phone technology but most likely they would have rejected the notion of being compelled to surrender all of one's privacies and leaving such in the hands of officers with the unlimited authority to conduct searches for evidence of criminal activity. Empowering the government with the unlimited authority to access all one's information and pry into all one's personal matters was the exact reason Lord Camden condemned such general warrants. To have "read over, pried into, and examined all of the private papers, books, ect. of the plaintiff... whereby the secret affairs, ect. of the plaintiff became wrongfully discovered[]" was declared unlawful as "the secret nature of those goods" was "an aggravation of trespass." Id. at 1066. Such an "invasion of [this] indefeasible right of personal security" and the "privacies of life" were later condemned by this Court. Boyd, 116 U.S. at 630.

This case involves personal privacy and such uncertainty and inconsistency should not persist in the law. As this Court continues to note, the ubiquity of cell phones make them such that they are virtually a "feature of human anatomy", such as to be implicated in nearly every government/citizen encounter, even in absentia. Riley, 573 U.S. at 385. Shall we entrust the scope of a search on the privacies of life up to government agents unfettered discretion? The Self-Incrimination Clause "reflects... our respect for the inviolability of the human personality and the right of each individual 'to a private enclave where he may lead a private life.'" Murphy, 378 U.S. at 55 (quoting United States v. Grunewald, 233 F.2d 556,581-82 (2nd Cir. 1956)). Must we surrender this "private enclave" on the possibility we can assist the government

in our own prodecution? Would the framers have ever approved of such measures?

Cell phones are basic tools of modern society and such a decision to allow arbitrary and unfettered general search power to go unchecked will "alter the relationship between citizen and government in a way that is inimical to democratic society." United States v. Jones, 565 U.S. 400, 429 (2012) (Sotomayor, J., concurring). Courts have condemned "such a discretionary power [] given to messengers to search wherever their suspicions may chance to fall." Wilkes v. Wood, 98 Eng. Rep. 489,498 (1763). "It is not fit, that the receiving or judging of the information should be left to the discretion of the officer." Money v. Leach, 97 Eng. Rep. 1075,1088 (1765). Additional percolation would not aid this Court's consideration pn the issues as technology is quickly outpacing the law and the impact of allowing the government to compel the privacies of life and conduct unfettered searches threatens to undermine the security of the people as a whole. The Fourth and Fifth Amendments are seemingly intertwined in Petitioner's case but their text and history are threatened by uncritical extensions to inapt precedent and currently "at the mercy of advancing technology." Kyllo v. United States, 533 U.S. 27,35 (2001). This Court must reconcile its recent Fourth Amendment precedent with the spirit of the Fifth Amendments protection in the digital era.

Petitioner's case is an ideal vehicle through which this Court can reconcile the Fourth and Fifth Amendments and determine whether Boyd is still good law. This Court can address the foregone conclusion

rationale and determine whether it applies to everyone who can merely access their own encrypted digital device. This case is a great opportunity to revist Entick as this Court has mentioned it as "a wellspring of the rights now protected by the Fourth Amendment." Stanford v. Texas, 379 U.S. 476,484 (1965). This Court has insisted that officials "take care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy." Andresen, 427 U.S. at 482. Given the State's total disregard of this Court's clear directive and its failure in limiting its search and seizure to the reason it sought a warrant in the first place, this Court may have a vested interest in giving the constitutional protections envisioned by the framers meaningful teeth. Even if this Court were to find a warrant for "all data/software" legitimate, this Court has recognized "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." Terry v. Ohio, 392 U.S. 1,28-29 (1968). What the appeals court permitted in Petitioner's case was for "a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with a general warrant." Stanley v. Georgia, 394 U.S. 557,572 (1969). As one court has noted, "[s]earching officers may not cart away documents unspecified by the warrant which simply look somewhat suspicious, comb through them carefully at their leisure ... [t]hat sort of abuse would return us to the days of the general warrant and must be scrupulously avoided."

United States v. Heldt, 668 F.2d 1238,1267 (D.C. Cir. 1981). "[T]he right of personal security ... involves, not merely protection of [a] person from assault, but exemption of his private affairs ... from the inspection and scrutiny of others[.]" Interstate Commerce Comm'n v. Brimson, 154 U.S. 447,479 (1894). The warrant clause incorporated the particularity requirement to "prevent[] the issue of warrants on loose, vague, or doubtful bases of fact," promoting the Fourth Amendment's purpose "to protect against all general searches[.]" Go-Bart Importing Co. v. United States, 282 U.S. 344,357 (1931). Such a broad interpretation of the foregone conclusion rationale and uncertainty in the scope of the Fourth Amendment's protection in the digital era threaten to abolish safeguards protecting people from being "secure [] in the discretion of police officers[.]" Coolidge, 403 U.S. at 449. The state and appeals court have paved a path for general warrants and eviscerated the privilege against self-incrimination in cell phones users suspected of anything. In their opinion, the Fourth and Fifth Amendment shall yield to government investigation. "A magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the Kingdom" is the existential threat we face by allowing an unfettered search power to exist. Huckle v. Money, 95 Eng. Rep. 768,769 (1763). "[E]very house will fall under the power of a secretary of state to be rummaged before proper conviction." Entick, 19 How. St. Tr. at 1071. Such an "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government[.] Brinegar v. United

States, 338 U.S. 160,180-81 (1949) (Jackson, J., dissenting). With a digital record of nearly every aspect of one's life on a cell phone, this Court should be leery of the law espoused from the court of appeals in Petitioner's case. Only this Court can make the ultimate constitutional judgment on a case that may have profound implications on privacy and liberty. With such confusion, controversy, and uncertainty regarding the scope of protections the Fourth and Fifth Amendment's have, this would be a perfect opportunity for this Court to intervene and supply much needed guidance to the lower courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Joanthony D. Johnson

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Petitioner pro se

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