RECORD NO. _____

IN THE
Supreme Court of the United States

MOJISOLA POPOOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW
BY MOJISOLA POPOOLA

1. Whether the physical act of a person in police custody responding to a request to enter her passcode to unlock an encrypted cellphone, is testimonial conduct protected by the Fifth Amendment.

2. Whether digital evidence derived from the cellphone must be suppressed if Miranda warnings were intentionally not given prior to the request to enter her passcode to unlock an encrypted cellphone.

RELATED CASES

U.S. District Court for the District of Maryland, Southern Division (Victor Oloyede, 8:15-cr-00277-PWG-3, Judgment 2/16/17) (Babatunde E. Popoola, 8:15-cr-00277-PWG-5, Judgment 3/30/17) (Gbenga B. Ogundele, 8:15-cr-00277-PWG-1, Judgment 3/30/17)

U.S. Court of Appeals for the Fourth Circuit. Consolidated Cases, Victor Oloyede, 17-4102, Babatunde E. Popoola,17-4186, Mojisola T. Popoola, 17-4191, Gbenga B. Ogundele,17-4207, Judgment Entered July 31, 2019.

U.S. Court of Appeals for the Fourth Circuit. Consolidated Cases, Victor Oloyede, 17-4102, Babatunde E. Popoola,17-4186, Mojisola T. Popoola, 17-4191, Gbenga B. Ogundele,17-4207, Judgment/ Order denying rehearing and rehearing en banc, October 1, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Mojisola Popoola respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

CITATION TO OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit (USCA4) issued an opinion in Record No. 17-4191 on July 31, 2019. *United States v. Oloyede*, et al., 933 F.3d 302 (4th Cir. 2019). Petitioner filed a Petition for En Banc Rehearing on September 9, 2019. The USCA4 denied this petition on October 1, 2019.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Facts and Proceedings Below

Ms. Popoola filed a Motion to Suppress Statements and Evidence seized from her iPhone, as fruits arising from the statement identifying her iPhone and passcode to unlock the iPhone. The statement and iPhone contents were obtained during the execution of an arrest warrant for her and her husband Gbenga Ogundele and search warrant for their home. The FBI entered the house at approximately 6:30 a.m. with approximately 10 agents with guns drawn. (9/22/16 Tr., Appendix D [App.], 26). They located Ms. Popoola in her pajamas and informed her she was under arrest and that the FBI had a warrant to search the house. Ms. Popoola was not free to leave while

law enforcement searched the house. (App.D, 33). She was not advised of her *Miranda* rights at any time during the search of the house. (App.D, 30). Agent Winkis testified that she asked Ms. Popoola where her cell phone was located and Ms. Popoola advised her it was on the night stand in her bedroom. (App.D, 28). Agent Winkis was unable to find it herself but another agent found an iPhone in the bedroom and handed it to agent Winkis. (App. D, 28-29). Agent Winkis noted it was an Apple iPhone and it was locked and testified she said to Ms. Popoola, "could you please unlock your iPhone". Agent Winkis knew Ms. Popoola had the right to refuse but she did not advise her of her rights. (App. D, 30-31). When agent Winkis was asked if she told Ms. Popoola that she would get the phone back quicker if she unlocked it herself, she acknowledged she told the AUSA that and she thought she may have said that, but when she refreshed her recollection on this case, she said "I don't believe I told Ms. Popoola that". (App.D, 33-35) When asked what she used to refresh her recollection, she stated that she "… looked at old 302s and I looked at the photographs at the scene" but she did not have any of her own notes concerning what happened with Ms. Popoola. (App. D, 34).

Ms. Popoola acquiesced, took the iPhone, and entered the password to open it. (App.D, 23). Agent Winkis then handed the iPhone to the forensic agent to be imaged (searched). Id. The data seized from the iPhone was subsequently introduced at trial in the government's case in chief.

Ms. Popoola's counsel argued in her pretrial Motion to Suppress that her statement while in police custody was made as a result of a violation of her Fifth

Amendment rights. The statements were made without prior *Miranda* warnings and were made involuntarily. The District Court ruled that the specific statement in question was made voluntarily because the circumstances were not coercive or threatening and the request for Ms. Popoola to unlock the phone was courteous and not commanding. (App.C,18). The District Court also ruled that the act of Ms. Popoola entering her passcode into the iPhone was neither a testimonial statement nor communicative conduct for Fifth Amendment purposes and therefore any evidence derived from it would not be suppressed. (App.C,19-20).

B. Direct Appeal

On direct appeal, the Court of Appeals for the 4th Circuit characterized the issue presented as: " …whether a person in custody, who has not been given *Miranda* warnings, was compelled to incriminate herself in violation of the Fifth Amendment when she voluntarily, pursuant to an officer's request, used her passcode to open her cell phone but did not disclose the passcode." *United States v. Oloyede*, et al, 933 F.3d 302, 309 (4th Cir. 2019). The Court of Appeals acknowledged that an act may constitute a testimonial communication:

> While a testimonial communication is most often in verbal or written form, it may also be made by an act.[*United States v Sweets*, 526 F.3d 122,127 (4th Cir. 2007)]But to be a testimonial communication, the act must "relate a factual assertion or disclose information," *Doe v. United States*, 487 U.S. 201, 210, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988); it must "express the contents of [the person's] mind," Id. at 210, 108 S.Ct. 2341 n.9.

Id. at 309. The Court of Appeals concluded that Ms. Popoola's act was not a testimonial communication because she did not reveal her cellphone's unique

passcode. The court distinguished her action of typing in her passcode from verbally giving her passcode to the agent for the agent to enter, holding that her action was more like rendering a key to a strongbox as opposed to telling an inquisitor the combination to the safe:

> Unlike a circumstance, for example, in which she gave the passcode to the agent for the agent to enter, here she simply used the unexpressed contents of her mind to type in the passcode herself. See *United States v. Hubbell*, 530 U.S. 27, 43, 120 S.Ct. 2037,147 L.Ed.2d 24 (2000) (distinguishing "surrender[ing] the key to a strongbox," which is not communicative, from "telling an inquisitor the combination to a wall safe," which is communicative).

Id. Relying on the Supreme Court's decision in *Patane,*[1] the court held that even if it were to find that she made a testimonial communication, "…the fruit of that voluntary communication, even though made without a *Miranda* warning, would nonetheless be admissible into evidence." *Id.*

REASONS FOR GRANTING THE WRIT

Mojisola Popoola petitions for a Writ of Certiorari for this Court to decide whether the physical act of a person in police custody responding to a request to enter her passcode to unlock an encrypted cellphone, is testimonial conduct protected by the Fifth Amendment, and whether digital evidence derived from the cellphone must be suppressed if *Miranda* warnings were intentionally not given prior to the request. There is currently a split between the 4th Circuit and the 11th Circuit with regard to whether the physical entry of a passcode to decrypt a locked cellphone or a locked laptop is testimonial conduct subject to Fifth Amendment protections.

[1] *United States v. Patane*, 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004) (plurality opinion)

Moreover, the alternative holding of the 4th Circuit in this case that this Court's decision in *United States v. Patane*, supra, rendered the communication admissible even in the absence of a prior *Miranda* warning, fails to address the issue unresolved in *Patane* as to whether intentional bad faith efforts by law enforcement to circumvent *Miranda* warrant the continued application of *Miranda's* presumption that the testimonial statement was involuntary.

THERE IS A CONFLICT IN THE CIRCUITS ABOUT WHETHER THE ACT OF ENTERING A PASSCODE INTO A CELLPHONE IS TESTIMONIAL CONDUCT.

The 4th Circuit's distinction between physically entering a passcode in this case and a verbal statement disclosing the passcode has little support in caselaw and is in conflict with other courts. It asserts that it is more akin to "surrender[ing] the key to a strongbox," which is not communicative, than "telling an inquisitor the combination to a wall safe," quoting from *United States v. Hubbell*, supra. Other courts have reached the opposite conclusion. The 11th Circuit Court of Appeals, other U.S. District Courts, and state courts, have held that the act of entering a passcode into a laptop or a cellphone is testimonial conduct. The 11th Circuit in *United States v. Doe,* 670 F.3d 1335 (11th Cir. 2012) (*In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*) held that the entry of a passcode to decrypt a laptop was testimonial conduct protected by the Fifth Amendment.

In *United States v. Maffei,* No. 18-CR-00174-YGR-1, 2019 WL 1864712, at 1 (N.D. Cal. Apr. 25, 2019), the District Court in Northern California held that the defendant's provision of her cellphone passcode used the contents of her mind and

implied factual statements, including which of the three seized cellphones belonged to her and that she had control over or a relatively significant connection to the cellphone. Therefore, her statement constituted a testimonial communication. In reaching this conclusion, the court relied upon the 11th Circuit's decision in *United States v. Doe,* supra, where that court in turn relied on this Court's decisions in *Fisher v. United States,* 425 U.S. 391, 410, 96 S.Ct.1569,1581 (1976), *Doe v. United States*, ("Doe II"), 487 U.S. 201, 210 n.9 (1988), and *United States v. Hubbell*, supra, to determine that "the decryption and production of the contents of ... hard drives is testimonial in character." *Doe*, 670 F.3d at 1345 ("Requiring Doe to *use* a decryption password is most certainly more akin to requiring the production of a combination because both demand the use of the contents of the mind...) *Id.* at 1346. (emphasis added). "The touchstone of whether an act of production is testimonial is whether the government compels the individual to use 'the contents of his own mind' to explicitly or implicitly communicate some statement of fact." *Id.* at 1345 (quoting *Curcio v. United States*, 354 U.S. 118, 128, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957)).

In *United States v. Sanchez,* 334 F. Supp. 3d 1284, 1289 (N.D. Ga. 2018), the court recognized the scarcity of case law on this issue, but none-the-less determined that the production of cellphone passwords constitutes incriminatory testimony protected by the Fifth Amendment. *Id.*, 1294-95. The court referenced a handful of cases that address this issue to support their decision, most notably *State v. Trant*, No. 15-2389, 2015 WL 7575496, at 3, 2015 Me. Super. LEXIS 272, at 11 (Me. Sup. Ct. Oct. 27, 2015). In *Trant*, the government sought an order compelling the defendant to enter

the passcode into his cellphone. The court found that "compelling Defendant to divulge the contents of his mind – either by compelling him to surrender the passcodes or compelling him to himself open the phones – would violate his privilege against self-incrimination protected by the Federal and Maine Constitutions." *Id.*

The U.S. District Court in D.C. held in *Matter of Search of [Redacted] Washington, D.C.*, 317 F. Supp. 3d 523, 526 (D.D.C. 2018), that while entering biometric information such as fingerprint to unlock a cell phone is not testimonial conduct, entering a decryption password is. In reaching this conclusion, the D.C. Court also relied upon the 11th Circuit's reasoning in *In re Subpoena Duces Tecum, supra,* and *Massachusetts v. Gelfgatt*, 468 Mass. 512, 11 N.E.3d 605, 614 (2014), which held that a defendant's act of entering a decryption key would be a communication of his knowledge about particular facts that would be relevant to the state's case.

In *Pollard v. State*, 2019 WL 2528776, No. 1D18-4572, 2019 WL 2528776, (Fla. Dist. Ct. App. June 20, 2019) the court found that forcing a defendant to disclose a password, whether by speaking it, writing it down, or physically entering it into a cellphone, compels information from that person's mind and thereby falls within the core of what constitutes a testimonial disclosure.

Recently, three district courts in the 9th circuit have come out differently on whether physical decryption of cell phones constitutes testimonial conduct, making the issue ripe for decision in that circuit as well. *See Matter of Residence in Oakland, California*, 354 F. Supp. 3d 1010 (N.D. Cal. 2019) (biometric features that are utilized to potentially unlock an electronic device are testimonial under the Fifth

Amendment's privilege against self-incrimination); *Matter of White Google Pixel 3 XL Cellphone in a Black Incipio Case*, 398 F. Supp. 3d 785 (D. Idaho 2019) (application of the fingerprint to the sensor is simply the seizure of a physical characteristic and does not violate the Fifth Amendment because it does not require the suspect to provide any testimonial evidence); *United States v. Warrant*, No. 19-MJ-71283-VKD-1, 2019 WL 4047615 (N.D. Cal. Aug. 26, 2019) (requiring an individual to use a biometric feature to unlock an electronic device so that its contents may be accessed is an act of production that is inherently testimonial in the context of a criminal investigation).

BECAUSE THE MIRANDA VIOLATION WAS INTENTIONAL AND THE GOVERNMENT DID NOT PROVE GOOD FAITH, EVIDENCE OBTAINED FROM THE CELLPHONE SHOULD BE SUPPRESSED.

The Panel here found that even if the act of entering a passcode into a locked, encrypted device was testimonial, the contents of Ms. Popoola's phone would still come in under *United States v. Patane,* because "the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause" and that the Clause "is not implicated by the admission into evidence of the physical fruit of a *voluntary statement*." *Oloyede*, 933 F3d at 309. (Quoting Patane, 542 U.S. at 636). Ms. Popoola argues that her testimonial conduct was not voluntary when she was placed under arrest, her home was full of FBI agents searching everywhere, and she was not advised of her right to refuse to tell Agent Winkis where her cellphone was or her right to refuse to provide her cellphone's passcode. The mere fact that Agent Winkis politely commanded her to enter her passcode is of no consequence. Fourth

Circuit case law imposes the burden on the government to establish that the defendant's statement was given voluntarily and requires courts to view the totality of the circumstances when deciding whether an individual's statements were made voluntarily.[2]

Ms. Popoola also argues that *Patane* does not apply to the contents of a cellphone which courts have recognized is beyond what could have been contemplated as physical evidence.[3] Though several district courts have found otherwise, no other circuit court has ruled on this matter.

Ms. Popoola further argues that *Patane* should not apply since, unlike the facts in *Patane,* the *Miranda* violation was intentional and it was not in good faith. In *Patane*, the police started to give *Miranda* warnings but they were interrupted by Patane who volunteered that he knew his rights. Thus, the issue of a bad faith effort to circumvent the defendant's rights was not at issue. As Justice Breyer commented in his dissenting opinion in *Patane*, courts should exclude physical evidence derived from unwarned questions unless the failure to provide *Miranda* warning was in good faith. *Patane* :

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[2] *United States v. Pelton,* 835 F.2d 1067, 1071 (4th Cir.1987) (requiring courts to look at totality of circumstances to determine whether defendant's will has been overborne or his capacity for self-determination critically impaired, including characteristics of the defendant, the setting of the interview, and the details of the interrogation.)

[3] A cell phone is not just a physical object containing information. It is more personal than a purse or a wallet, and certainly more so than the firearm that was used in evidence against Respondent Patane. It is the combined footprint of what has been occurring socially, economically, personally, psychologically, spiritually and sometimes even sexually, in the owner's life, and it pinpoints the whereabouts of the owner over time with greater precision than any tool heretofore used by law enforcement without aid of a warrant. In today's modern world, a cell phone passcode is the proverbial "key to a man's kingdom." *United States v. Djibo*, 151 F. Supp. 3d 297, 310 (E.D.N.Y. 2015) (citing *Riley v. California,* 134 S. Ct 2473, 189 L. Ed. 2d 430 (2014)).

> For reasons similar to those set forth in Justice Souter's dissent and in my concurring opinion in Missouri v. Seibert, [542 U.S. 600 (2004)], I would extend to this context the "fruit of the poisonous tree" approach, which I believe the Court has come close to adopting in Seibert. Under that approach, courts would exclude physical evidence derived from unwarned questioning unless the failure to provide Miranda v. Arizona, warnings was in good faith. Because the courts below made no explicit finding as to good or bad faith, I would remand for such a determination.

542 U.S. at 647–648. (Citations omitted)[4]

Here, Agent Winkis was aware that the government would be unable to access Ms. Popoola's phone without her entering her passcode, and deliberately avoided providing her with *Miranda* warnings to prevent her from invoking her Fifth Amendment right not to incriminate herself and type in the password to unlock the phone. Agent Winkis noted it was an Apple iPhone and it was locked and asked Ms. Popoola if she could she please open the phone. Ms. Popoola took the phone and put the numbers (password) in to open it. (App.D, 22-23). Agent Winkis knew at the time Ms. Popoola had the right to refuse but she did not advise her of her rights. (App.D, 29-31). Thus, the facts of this case, unlike *Patane,* support the application of *Miranda* and the fruit of the poisonous tree doctrine to bad faith efforts by law enforcement to circumvent the intent of *Miranda* warnings. As Justice Souter along with Justices Stevens and Ginsburg said in their dissent in *Patane*: "There is no way to read this case except as an unjustifiable invitation to law enforcement officers to flout *Miranda*

[4] In *Missouri v. Seibert*, 542 U.S. 600 (2004) decided the same day by a different plurality, the Court held that *Miranda* warnings given mid-interrogation, after the defendant gave an unwarned confession, were ineffective, and the thus the confession repeated after the warnings were given was inadmissible.

when there may be physical evidence to be gained." *Id.* at 647. Clearly, that is the case here.

This is an issue that is likely to repeat itself and the Court has the ability to clarify that *Patane* did not reach the issue of intentional or bad faith efforts of law enforcement to trick defendant's into waiving their Fifth Amendment rights. The Court can prevent further abuse by government officials who act in bad faith to subvert the requirements of *Miranda* to access the contents of an individual's cellphone.

CONCLUSION

Granting Certiorari in this case will allow the Court to clarify conflicts about what constitutes testimonial conduct or communication by holding that petitioner's conduct was testimonial for Fifth Amendment purposes when she was in FBI custody and, in response to interrogation, entered her passcode into her encrypted iPhone. This Court should make clear that absent a good faith reason to not give *Miranda* warnings prior to eliciting a person in custody's passcode, either by verbal communication, written communication or a communicative act, as in this case, violates the prophylactic purpose of Miranda and will be presumed involuntary. These are significant constitutional issues that directly implicate the scope and protection of the Fifth Amendment's protection not to incriminate one's self that will have ramifications on current and future cases throughout this country, for which there is no clear Supreme Court precedent and there is clearly a split in the circuit courts and state courts.

Based on the foregoing, Petitioner respectfully requests that this Honorable Court grant this Petition.

Respectfully submitted,

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