APPENDIX

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APPENDIX A

2023 WL 8635197

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Supreme Court of Utah.

STATE of Utah, Petitioner,
v.
Alfonso VALDEZ, Respondent.

No. 20210175
|
Heard March 16, 2022
|
Reheard March 8, 2023
|
Filed December 14, 2023

Synopsis

Background: Defendant was convicted in the Second District Court, Ogden Department, Joseph M. Bean, J., of kidnapping, robbery, and aggravated assault. Defendant appealed. The Court of Appeals, 482 P.3d 861, reversed and remanded. State petitioned for certiorari, which the Supreme Court granted.

Holdings: The Supreme Court, Petersen, J., held that:

as matter of first impression, verbally providing a cell phone passcode to law enforcement is a "testimonial communication" under Fifth Amendment's privilege against self-incrimination;

foregone conclusion exception to Fifth Amendment's privilege against self-incrimination did not apply to defendant's verbal refusal to provide law enforcement with cell phone passcode; and

State's trial commentary regarding defendant's refusal to provide officers with passcode and officers' inability to access text messages coordinating defendant's meeting with victim was not permissible as "fair response" to argument initiated by defendant.

Court of Appeals affirmed and remanded.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

On Certiorari to the Utah Court of Appeals, Second District, Ogden, The Honorable Joseph M. Bean, No. 171901990

Attorneys and Law Firms

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[1] Amici Curiae: John M. Mejia, Salt Lake City, for American Civil Liberties Union of Utah Foundation, Inc., American Civil Liberties Union Foundation, and Electronic Frontier Foundation; Jeffery C. Corey, John E. Cutler, Jordan E. Westgate, Salt Lake City, for National Association of Criminal Defense Lawyers

Justice Petersen authored the opinion of the Court, in which Chief Justice Durrant, Associate Chief Justice Pearce, Justice Hagen, and Judge Walton joined.

On Certiorari to the Utah Court of Appeals

Justice Petersen, opinion of the Court:

INTRODUCTION

***1** ¶1 Police officers arrested Alfonso Valdez for kidnapping and assaulting his ex-girlfriend. He had a cell phone in his pocket, and the officers seized it from him. At some point thereafter, the officers obtained a search warrant for the contents of Valdez's phone. But they were unable to access the phone's contents because they could not crack his passcode. So a detective approached Valdez, informed him that he had a warrant for the contents of the cell phone, and asked Valdez to provide his passcode. Valdez refused. Without the passcode, the police were never able to unlock the phone to search its contents.

¶2 Later, at Valdez's trial, the State elicited testimony from the detective about Valdez's refusal to provide his passcode when asked. And during closing arguments, the State argued in rebuttal that Valdez's refusal and the resulting lack of evidence from his cell phone undermined the veracity of one of his defenses. The jury convicted Valdez.

¶3 But on appeal, the court of appeals reversed the conviction. It agreed with Valdez that he had a right under the Fifth Amendment to the United States Constitution to refuse to provide his passcode, and that the State violated that right when it used his refusal against him at trial. The court found that the error was not harmless beyond a reasonable doubt, and it

reversed Valdez's conviction and remanded the case back to the district court for further proceedings.

¶4 On certiorari, the question before us is whether the State's references at trial to Valdez's refusal to provide his passcode constituted impermissible commentary on his decision to remain silent. Both the State and Valdez contend that the answer to this question turns on whether Valdez's refusal is protected by the Fifth Amendment's privilege against self-incrimination. The Fifth Amendment applies where a communication (here, providing a cell phone passcode) is compelled, testimonial, and incriminating. *See Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 189, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004).

¶5 The State does not challenge the court of appeals' determination that the communication at issue was compelled and incriminating. The State's only objection to the court of appeals' Fifth Amendment analysis is that providing a passcode is not a testimonial communication. The State contends this is so because the passcode itself "lacks 'semantic content and is entirely functional,' " and therefore "turning it over is akin to handing over a physical key—a non-testimonial act." (Quoting David W. Opderbeck, *The Skeleton in the Hard Drive: Encryption and the Fifth Amendment*, 70 FLA. L. REV. 883, 916 (2018).) Because of this, the State also argues that an exception to the Fifth Amendment referred to as the "foregone conclusion" exception applies here. The State reasons that, even if providing a passcode could be considered testimonial, the only meaningful information it would have conveyed here was that Valdez knew the passcode to the phone. But because the police already knew the phone belonged to Valdez—and presumably that he would know the passcode to his own phone—this information

would not convey anything new to law enforcement. The State argues that this triggers the foregone conclusion exception. Finally, the State argues in the alternative that during the trial, Valdez put the contents of his phone at issue, so the prosecutor's comments were permissible as a fair response to an issue that Valdez initiated.

***2** ¶6 Whether an accused has a Fifth Amendment right not to disclose a passcode to an electronic device when law enforcement has a valid warrant to search the device is a question of first impression for this court. The United States Supreme Court has not yet addressed this specific question, so we analyze existing Fifth Amendment precedent to determine how it should extend to this new factual context.

¶7 The prevalence of passcodes that encrypt the information on electronic devices—which are often seized by law enforcement while investigating criminal conduct—has raised important questions about how the Fifth Amendment extends to law enforcement's efforts to unlock these devices and decrypt the contents inside. These questions have proven to be especially complex where law enforcement attempts to access the contents of a seized device by means that do not require the suspect to disclose the actual passcode—like, for example, obtaining an order to compel the suspect to provide an unlocked device.

¶8 But that is not the situation we have before us. Here, law enforcement asked Valdez to verbally provide his passcode. While these circumstances involve modern technology in a scenario that the Supreme Court has not yet addressed, we conclude that these facts present a more straightforward question that is answered by settled Fifth Amendment principles.

¶9 We agree with the court of appeals that verbally providing a cell phone passcode is a testimonial communication under the Fifth Amendment. And we also agree that the "foregone conclusion" exception does not apply. This exception arises in cases analyzing whether an "act of production" has testimonial value because it implicitly communicates information. But here, we have a verbal communication that would have explicitly communicated information from Valdez's mind, so we find the exception inapplicable. Finally, we reject the State's "fair response" argument because the State elicited the testimony about Valdez's refusal to provide his passcode in its case in chief before Valdez had raised any issue involving the contents of his phone.

¶10 Accordingly, the State has not provided a basis for reversal. We affirm the court of appeals.

BACKGROUND[2]

¶11 Alfonso Valdez and Jane[3] dated and lived together briefly. Valdez was often violent during the relationship. Ultimately, Jane and Valdez separated, and Jane moved out.

¶12 Two months later, Valdez texted Jane and asked her to meet him. In the text exchange, Valdez claimed that he had received some of Jane's mail after she moved out and wanted to give it to her. Jane agreed to

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[2] "On appeal from a jury trial, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly." *State v. Speights*, 2021 UT 56, ¶ 4 n.1, 497 P.3d 340 (cleaned up).

[3] We use a pseudonym to protect the identity of the victim in this case.

meet Valdez outside her work following one of her shifts, but she feared that Valdez might become violent.

¶13 At the agreed-upon time and place, Jane located Valdez in his SUV and approached the passenger side. But rather than presenting her with mail, Valdez pointed a handgun at her and told her to get into the vehicle. She complied, and Valdez drove away with Jane in the car. As he was driving, Valdez verbally and physically assaulted Jane. He also forced her to give him her cell phone and purse. Jane was eventually able to jump out of the car and run away. She called the police from a nearby residence, but Valdez was gone before the police arrived.

The Investigation

***3** ¶14 The police located Valdez at his home that evening. They arrested him and transported him to the police station for questioning.

¶15 There, a detective seized Valdez's cell phone from him. He then read Valdez the *Miranda* warnings. And Valdez chose not to speak with the detective.

¶16 At some point that is not clear from the record, the police obtained a search warrant for Valdez's phone.[4] But the phone was protected by a nine-dot

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[4] This search warrant was not made part of the record on appeal. Further, the record is unclear as to whether the search warrant provided authority only for police to obtain the contents of the cell phone, or also explicitly included authority for police to obtain the phone's passcode to execute the search. During a colloquy with the district court at trial, the State said that "[a] warrant was obtained for the *passcode*." But when questioning the

pattern passcode, which the police did not know. They made numerous failed attempts to access the contents of the phone without the passcode.

¶17 Later, under circumstances that are not developed in the record, the detective approached Valdez and asked Valdez to provide the phone's passcode. The detective explained that he had a search warrant for the phone, and that if Valdez did not give him the passcode, he would have to unlock the phone with a "chip-off" procedure that would destroy the phone in the process. Valdez refused to give the detective his passcode and told the detective to just "destroy the phone."

¶18 Law enforcement was unable to retrieve the contents of Valdez's cell phone. As it turned out, even the chip-off procedure would not work. And during the criminal proceeding, the State did not move to compel Valdez to provide the passcode. Notably, the police were also unable to locate Jane's cell phone following the incident. So they were never able to look for evidence in either phone of the text exchange that led to Jane meeting with Valdez.

Valdez's Trial

¶19 Valdez's case went to trial. During the State's case in chief, the detective testified that although the police had a search warrant for Valdez's phone, they "were unable to gain access to the data inside the phone." The State then asked the detective, "[A]re you familiar with why you were unable to access the data?" He

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detective, the State asked him if he obtained a "warrant to search the *phone*," to which he replied, "Yes, I did." (Emphasis added.)

answered, "Yes." The State continued: "Why is that?" When the detective began to respond about the need for a passcode, defense counsel promptly requested a bench conference.

¶20 Counsel argued to the district court that Valdez had "a Fifth Amendment right ... to not provide [that] information." The State responded that "a warrant was obtained for the [passcode]," the detective "served the warrant on [Valdez]," and "[Valdez] refused to give the [passcode]." The State then argued that "[t]he jury ha[d] a right to know why the officers were unable to access the phone when there could have been evidence very pertinent to the case." The district court overruled defense counsel's objection.

¶21 The detective went on to testify about the specifics of his attempt to obtain Valdez's passcode. He relayed that he had "explained to [Valdez] that [he] had a search warrant" and was "asking for his passcode, otherwise [the police] were going to have to attempt to chip [it] off, [a] maneuver [where] you send [the phone] down to the lab at Dixie laboratories," which "destroys the phone." He testified that in response, Valdez refused to give his passcode and, seemingly in reference to the likely result of the chip-off procedure, told the detective that he could "destroy the phone."

***4** ¶22 After the State rested its case, Valdez moved for a mistrial based in part on the State's elicitation of the detective's testimony about Valdez's refusal to provide his cell phone passcode—again citing Fifth Amendment protections. After hearing argument on the motion, the district court stated that "the Fifth Amendment does not necessarily protect someone from ... almost obstructing an investigation by refusing to cooperate with police." The district court

explained that it was not inclined to treat Valdez's refusal to give the passcode as warranting Fifth Amendment protection. But the district court told the parties that it wanted to consider the issue further before making a definitive ruling. Ultimately, however, neither the parties nor the district court raised the motion again and, accordingly, no final ruling was made on the matter.

¶23 Next, the defense called multiple witnesses in Valdez's case in chief. Of relevance here, the defense called Valdez's ex-wife to the stand. The ex-wife's testimony countered Jane's earlier description of the incident with Valdez. She testified that shortly before Jane met Valdez at his SUV, Jane had shown her texts between Jane and Valdez that were "sexual of some nature" and that demonstrated, "between the both of them[,] a little anger, maybe kind of a makeup kind of thing." In contrast to the State's theory of a violent kidnapping, the ex-wife's testimony painted Valdez and Jane's encounter as consensual.

¶24 During closing arguments, the State argued in rebuttal that the ex-wife's testimony was not credible because the texts were not in evidence:

> Now, you heard [the ex-wife] say that she saw some texts. They were going to get back together and do sexual things. The state was very interested. You heard testimony from ... witnesses about the efforts that were taken to get into the defendant's phone to determine what, if any, communication happened between the two of them. You heard testimony about how the state used the lab that

we had here. Detective Hartman came and testified about the process that he went through, that the Weber County lab was unable to get into that phone. How there was an attempt made by [the detective] to reach out to another lab within the system. But that system was also unable to get into the phone. *The only way they could get into that phone to see what these text messages said was by getting the code from the defendant. And he chose to decline to do that.*

And they then attempted to use different codes ... some common [passcodes], and got it to the point where I think he said there were three attempts left and the phone was going to ... [g]o back to a factory reset. And it would lose all the information. And, at that point, [the detective] stopped trying. They didn't want to lose the data on the phone.

The state made and took a lot of effort to see what communications had gone on between them. Instead of providing any proof of text messages, they bring in the defendant's ex-wife to say that she, [who] didn't have a good relationship with the victim, happened to see the text between them [that] was of a sexual nature. Think of the motive she had to lie. ... Ladies and gentlemen, use your common sense. Those texts [aren't] here today.

¶25 The jury convicted Valdez of aggravated assault and the lesser included offenses of kidnapping and robbery. Valdez appealed.

Court of Appeals' Decision

¶26 In the court of appeals, Valdez argued that the State violated his Fifth Amendment privilege against self-incrimination when it commented at trial on his refusal to provide the cell phone passcode. In analyzing this claim, the court of appeals stated that it was not contested that Valdez had been "compelled" to provide the passcode and that providing the passcode would have been "incriminating." The court reasoned that the passcode was compelled because "[t]he State implied at trial that Valdez had an obligation to provide the swipe code to the investigating officers, and that he had no right to refuse." *State v. Valdez*, 2021 UT App 13, ¶ 25, 482 P.3d 861. And the court concluded that the passcode would have been incriminating because "it has long been settled that the Fifth Amendment's self-incrimination 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." *Id.* (cleaned up).

***5** ¶27 Accordingly, the court of appeals focused on whether a verbal statement of the passcode would have been "testimonial." *Id.* ¶ 26. Noting that the record was not clear, based on the "best reading of the record," the court proceeded with the understanding that the detective had asked "Valdez to make an affirmative verbal statement" "to provide the swipe code itself." *Id.* ¶¶ 34 –35. And the court held that this "would have unquestionably been testimonial." *Id.* ¶ 35.

¶28 Next, the court of appeals assessed the State's contention that even if a verbal expression of the passcode were testimonial, such a statement would fall within what has been termed the "foregone conclusion" exception to the Fifth Amendment.[5] The State argued that this exception applied because the passcode had "minimal testimonial significance" and added nothing to the State's case against Valdez. *Id.* ¶ 36. The court of appeals disagreed. It concluded that the exception is limited in scope, and the request for Valdez to verbally provide his passcode did not fall within the exception's tight boundaries. *Id.* ¶¶ 37 –44.

¶29 Having determined that Valdez's refusal to provide his passcode was protected by the Fifth Amendment, the court of appeals concluded that the State's commentary at trial on Valdez's refusal was a Fifth Amendment violation. *Id.* ¶¶ 45 –48. The court rested its holding on *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), which held that the

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[5] The term "foregone conclusion" first appeared in a Supreme Court case in which the Court analyzed whether an act of producing documents in response to a government subpoena might warrant Fifth Amendment protection because the act implicitly communicated information to the government. *See Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). The Court determined that the act of production at issue was not "testimonial" because any information that was implicitly communicated by the act was already known to the government and was therefore a "foregone conclusion." *Id.* at 411, 96 S.Ct. 1569. Courts have applied the foregone conclusion exception in cases involving Fifth Amendment claims ever since. *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011*, 670 F.3d 1335, 1346–49 (11th Cir. 2012); *Commonwealth v. Davis*, 656 Pa. 213, 220 A.3d 534, 548–51 (2019); *People v. Sneed*, No. 127968, —— Ill.Dec. ——, —— N.E.3d ——, 2023 WL 4003913, at *13–16 (Ill. June 15, 2023).

Fifth Amendment forbids either comment by the prosecution or instructions by the court that an accused's decision to not testify at trial is evidence of guilt. *Valdez*, 2021 UT App 13, ¶ 45, 482 P.3d 861. On the court's reading of the record, the State had directly elicited testimony regarding Valdez's refusal to provide the passcode during its case in chief and then used that testimony in its closing argument to undercut Valdez's defense and invite the jury to make an inference of Valdez's guilt. *Id.* ¶¶ 46 –47. The court of appeals held that this use of Valdez's constitutionally protected silence against him impermissibly contravened the Fifth Amendment as described in *Griffin*. *Id.* ¶¶ 47 –48.[6] And the court concluded that this

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[6] Neither party challenges the court of appeals' reliance on *Griffin* on this point. Indeed, both parties rely on *Griffin* in the same manner. However, we note that the silence involved in *Griffin* was a defendant's decision not to testify *at trial*. *Griffin v. California*, 380 U.S. 609, 609–10, 614–15, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). In a footnote in *Miranda v. Arizona*, the Court indicated that the rationale of *Griffin* would apply to trial commentary on a defendant's post-arrest, post-*Miranda* silence. 384 U.S. 436, 468 n.37, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) ("In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. *Cf. Griffin v. State of California* ...."). But neither of the parties have identified a case where the Court has actually applied *Griffin* to trial commentary about a defendant's post-*Miranda*, pre-trial silence. This may be because it generally looks to the Due Process Clause in such circumstances. *See Greer v. Miller*, 483 U.S. 756, 761–65, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (explaining that in a case involving trial commentary on post-*Miranda*, pre-trial silence, "[t]he starting point of [the Court's] analysis is *Doyle v. Ohio*" and the Due Process Clause). We note this to clarify that if the State had

violation was not harmless beyond a reasonable doubt and therefore Valdez's conviction had to be vacated. *Id.* ¶¶ 51 –53.

***6** ¶30 On this basis, the court of appeals reversed Valdez's conviction and remanded to the district court for further proceedings. *Id.* ¶ 58.

¶31 The State petitioned this court for certiorari, which we granted. We have jurisdiction under Utah Code section 78A-3-102(3)(a).

STANDARD OF REVIEW

¶32 "On certiorari, this court reviews the decision of the court of appeals for correctness, giving no deference to its conclusions of law." *State v. Scott*, 2020 UT 13, ¶ 27, 462 P.3d 350 (citation omitted).

ANALYSIS

¶33 In granting certiorari, we certified the following question:

> Whether the Court of Appeals erred in concluding that [the State's] elicitation and use of testimony about [Valdez's] refusal to provide a code for his phone constituted an impermissible commentary on an exercise of a decision to remain silent.

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challenged the applicability of *Griffin*, Valdez would have needed to provide legal argument and analysis about why *Griffin* should be extended to the circumstances here—trial commentary on Valdez's post-*Miranda*, pre-trial silence—instead of the traditional "starting point" of such an analysis under *Doyle v. Ohio* and the Due Process Clause. *Id.* at 761, 107 S.Ct. 3102.

¶34 Both parties focus their answer to this question on whether Valdez had a Fifth Amendment right to refuse to provide his passcode in the first instance. The State argues that if Valdez had no such privilege, then at trial, "the State could introduce evidence of his refusal to comply with a lawful court order and argue that it supported his guilt." Valdez agrees with this framing of the issue. He argues that if his refusal was protected by the Fifth Amendment, then the State's trial commentary undermined his Fifth Amendment privilege against self-incrimination.[7]

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[7] For purposes of this appeal, we address only the Fifth Amendment arguments that the parties have made. But to avoid confusion in future cases, we clarify that it is usually the Due Process Clause that governs the analysis of a claim that the State improperly commented on a defendant's post-arrest, post-*Miranda* silence at trial. Although the record indicates that Valdez was *Mirandized* and chose not to speak with police before the detective asked him for his passcode, we do not opine on how the Due Process Clause applies here because Valdez has not advanced such an argument. But we clarify that, generally, the United States Supreme Court has established that the government cannot comment at trial on a defendant's post-arrest, post-*Miranda* silence as a matter of fundamental fairness under the Due Process Clause. *See Doyle v. Ohio*, 426 U.S. 610, 617–18, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). This is so because the *Miranda* warning itself carries an implicit assurance that silence will carry no penalty. *Id.* at 618, 96 S.Ct. 2240. In other words, "once a person has been told they have 'the right to remain silent,' it is unconstitutional to then use their silence against them." *State v. Bonds*, 2023 UT 1, ¶ 51 n.10, 524 P.3d 581 (quoting *Doyle*, 426 U.S. at 617–18, 96 S.Ct. 2240). And this due process rationale does not depend on whether the "silence" would independently qualify for Fifth Amendment protection. *See Wainwright v. Greenfield*, 474 U.S. 284, 291 n.7, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) ("Notably, the Court in *Doyle* did not rely on the contention that Ohio had violated the defendants' Fifth Amendment

***7** ¶35 The State argues that the court of appeals erred in reversing Valdez's conviction for three reasons: (1) Valdez's refusal was not protected by the Fifth Amendment because providing a cell phone passcode to law enforcement is not a testimonial communication; (2) even if Valdez's statement of his passcode had some testimonial value because it would implicitly communicate that Valdez knew the passcode, the police already knew the phone belonged to Valdez, so the foregone conclusion exception should apply in this case; and, in the alternative, (3) the prosecutor's trial commentary was a fair response to Valdez putting the phone's contents at issue.

¶36 We first address the State's argument that providing a passcode is not a testimonial communication. We disagree. Providing a passcode is testimonial because it is a communication that discloses information from the person's mind. We then move to the State's other arguments. We conclude that the

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privilege against self-incrimination by asking the jury to draw an inference of guilt from the exercise of their constitutional right to remain silent."); *Salinas v. Texas*, 570 U.S. 178, 188 n.3, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013) ("Petitioner is correct that *due process* prohibits prosecutors from pointing to the fact that a defendant was silent after he heard *Miranda* warnings, *Doyle v. Ohio*, 426 U.S. 610, 617–618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), but that rule does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him ...."). Accordingly, while we analyze here whether Valdez's refusal meets the requirements for Fifth Amendment protection because that is the argument before us, we want to make clear that, in general, the Due Process Clause protects an accused's post-arrest, post-*Miranda* silence *because they have been told that they have the right to remain silent*, regardless of whether the statement was compelled, testimonial, and incriminating.

foregone conclusion exception does not apply here. That exception arises in cases involving compelled acts of producing evidence to determine whether the act has any testimonial value because the act implicitly conveys information. Such an analysis is not necessary in a case involving a verbal statement that explicitly provides information. And finally, we reject the State's argument that the State's commentary at trial was permissible because it was a fair response to arguments made by Valdez.

¶37 These are the only challenges the State raises to the court of appeals' decision. It does not argue that the communication was not compelled or incriminating, so those issues are not before us. Accordingly, the State has not persuaded us that the court of appeals' decision should be reversed. And we affirm.

I. VERBALLY PROVIDING A CELL PHONE PASSCODE TO LAW ENFORCEMENT IS A TESTIMONIAL COMMUNICATION

¶38 The State's first contention is that providing a cell phone passcode to law enforcement is not "testimonial" under the Fifth Amendment because the passcode has no inherent semantic content and is equivalent to the physical act of turning over a key. The Self-Incrimination Clause of the Fifth Amendment reads: "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Supreme Court has explained that "the privilege protects a person only against being incriminated by his own compelled testimonial communications." *Doe v. United States*, 487 U.S. 201, 207, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988) (cleaned up). Thus, the Self-Incrimination Clause applies to communications that are "testimonial, incriminating,

and compelled." *Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cnty.*, 542 U.S. 177, 189, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004).

¶39 The court of appeals stated that the "compelled" and "incriminating" elements of the Fifth Amendment analysis were not disputed in this case. *State v. Valdez*, 2021 UT App 13, ¶ 25, 482 P.3d 861. The parties have not argued otherwise on certiorari. And the State challenges only the court of appeals' conclusion that providing a passcode is "testimonial." So this case turns only on whether verbally providing a passcode to a cell phone is a "testimonial communication."[8]

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[8] In this case, determining the testimonial nature of providing a passcode is largely a legal issue that we can determine on the record before us. But if there would have been a dispute about whether the communication was compelled or incriminating, it would have been difficult to resolve those issues on this record. This is because the State did not move in the district court to compel Valdez to provide his passcode (or an unlocked phone). So there was no direct litigation in the district court as to whether the Fifth Amendment shielded Valdez from doing so. There was only a passing reference to the Fifth Amendment at trial in relation to whether the prosecutor's comments were permissible. Consequently, there is not much evidence or legal argument in the record relevant to whether the communication was compelled, testimonial, and incriminating. And there are no factual findings or legal conclusions by the district court with respect to those issues. Because the State has not disputed that the communication here was compelled and incriminating, we need not address those Fifth Amendment elements and we focus only on the testimonial nature of the communication at issue. We express no opinion as to whether the communication here was compelled and incriminating. But in future cases involving disputes over government efforts to compel the decryption of the contents of electronic devices, we encourage parties to develop in the district court a sufficient factual and legal record of the application of the

***8** ¶40 In general, "to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe*, 487 U.S. at 210, 108 S.Ct. 2341. This is because it is the "extortion of information from the accused himself that offends our sense of justice." *Couch v. United States*, 409 U.S. 322, 328, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973). Put another way, the "touchstone" used to determine if communication "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." *In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011*, 670 F.3d 1335, 1345 (11th Cir. 2012) (cleaned up). "Only then is a person compelled to be a 'witness' against himself." *Doe*, 487 U.S. at 210, 108 S.Ct. 2341.

¶41 Although the Supreme Court has not yet addressed how the Fifth Amendment applies in this factual context, many state and federal courts have grappled with this issue. In doing so, the courts have generally faced two different factual scenarios that vary based on *how* law enforcement sought to decrypt the contents of the seized device. As the court of appeals identified, there are two common ways law enforcement might go about accessing the contents of a suspect's locked cell phone that entail the suspect's cooperation. *Valdez*, 2021 UT App 13, ¶ 32, 482 P.3d 861. First, an officer could ask or seek to compel the suspect to provide the passcode verbally or in writing. *Id.* Or second, an officer could ask or seek to compel the suspect to turn over an unlocked phone—whether

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Fifth Amendment if they wish to seek appellate review of these emergent issues.

through biometric means (for example, fingerprint or facial identification) or through entering the passcode themselves without providing the passcode to police. *Id.* In the first scenario, the suspect is asked to *tell* the officers what the passcode is, the officers learn that information, and the officers may enter the code into the phone to unlock it themselves. *Id.* In the second scenario, the suspect is asked to *do* something to unlock the phone themselves, but they are not asked to, and do not, share the passcode itself with law enforcement. *Id.*

¶42 The scenarios are similar in many respects. In both, law enforcement is interested in the contents of the device, not the passcode itself—although there could be unique circumstances where a passcode has some independent meaning relevant to an investigation. But for the most part, we agree with the State that the passcode functions primarily like a key to unlock the device. It generally does not have meaning of its own. And functionally, there may not be much real-world difference between verbally speaking or writing out a passcode for the police and physically providing an unlocked device to the police. Both give access to the contents of the device—the ultimate objective of law enforcement.

¶43 Yet, the two scenarios present distinct issues under the Fifth Amendment. The first scenario involves an oral or written statement explicitly conveying information. It presents what we might call "[o]rdinary testimony," which "involves a person communicating facts through language, using arbitrary sounds that the witness and the listeners intend and understand to be communicative." Laurent Sacharoff, *What Am I Really Saying When I Open My Smartphone? A*

Response to Orin S. Kerr, 97 TEX. L. REV. ONLINE 63, 66 (2019).

¶44 The second scenario involves a physical act that may implicitly convey information to the government.[9] Physical acts may or may not implicate the Fifth Amendment, depending on the factual circumstances. The Supreme Court has held that certain physical acts, such as providing a blood sample, giving a handwriting or voice exemplar, standing in a lineup, or wearing a particular item of clothing do not require a person to disclose the contents of their mind. *Doe*, 487 U.S. at 210, 108 S.Ct. 2341. Rather, these acts "make[ ] a suspect or accused the source of real or physical evidence" themselves. *Schmerber v. California*, 384 U.S. 757, 764, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (cleaned up). These acts do not require the suspect to "testify against himself[ ] or otherwise provide the State with evidence of a testimonial or communicative nature" and, accordingly, are not "testimonial" under the Fifth Amendment. *Doe*, 487 U.S. at 210–11, 108 S.Ct. 2341.

***9** ¶45 In contrast, the Court has deemed some physical acts to have testimonial value and therefore to fall within the Fifth Amendment's protection. In a line of cases involving government subpoenas for the production of evidence, the Supreme Court has held that sometimes an "act of producing evidence ... has communicative aspects of its own, wholly aside from the contents ... produced." *Fisher v. United States*, 425

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[9] *See Doe v. United States*, 487 U.S. 201, 210, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988) ("[I]n order to be testimonial, an accused's communication must itself, *explicitly* or *implicitly*, relate a factual assertion or disclose information.") (emphasis added).

U.S. 391, 410, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). Though the act of production does not explicitly communicate information through oral or written language, it may implicitly communicate certain information to the government. For instance, the act of responding to a subpoena for documents "tacitly concedes the existence of the papers demanded and their possession or control by the [suspect]. It also would indicate the [suspect's] belief that the papers are those described in the subpoena." *Id.*

¶46 In attempting to distinguish acts that are not testimonial from those that are, some courts have turned to an analogy advanced by Justice Stevens in his dissent in *Doe*, 487 U.S. at 219–21, 108 S.Ct. 2341 (Stevens, J., dissenting). Justice Stevens presented two circumstances: a suspect turning over a physical key to a strongbox and a suspect revealing the combination to a wall safe. *Id.* at 219, 108 S.Ct. 2341. To Justice Stevens, under the Fifth Amendment, a suspect "may in some cases be forced to surrender a key to a strongbox containing incriminating documents," but that person cannot "be compelled to reveal the combination to his wall safe—by word or deed." *Id.* The majority in *Doe* agreed with Justice Stevens's formulation, stating that it did "not disagree with the dissent that the expression of the contents of the individual's mind is testimonial communication." *Id.* at 210, 108 S.Ct. 2341 n.9 (cleaned up). But the majority held that the compelled act at issue in that case was "more like being forced to surrender a key to a strongbox containing incriminating documents than it is like being compelled to reveal the combination to [a] wall safe." *Id.* (cleaned up).

¶47 Then, in *United States v. Hubbell*, 530 U.S. 27, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000), the Supreme

Court further utilized the key/combination analogy. The Court explained that in identifying, assembling, and producing the large number of documents requested by a government subpoena in that case, "[i]t was unquestionably necessary for [the] respondent to make extensive use of the contents of his own mind." *Id.* at 43, 120 S.Ct. 2037 (cleaned up). And it held that doing so was "like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox." *Id.*

¶48 Thus, determining which scenario we are presented with dictates the analytical framework we must use to determine whether a statement or act is testimonial. If we are dealing with a suspect's oral or written communication that explicitly conveys information from the suspect's mind (scenario number one), we are in familiar Fifth Amendment territory. But if we are faced with a compelled act of producing evidence—such as handing over an unlocked phone (scenario number two)—we must determine whether the act implicitly conveys information and therefore has testimonial value for Fifth Amendment purposes.

¶49 In this case, we agree with the court of appeals that the best reading of the record is that the detective asked Valdez to verbally provide his passcode, placing us in scenario number one. *Valdez*, 2021 UT App 13, ¶ 34, 482 P.3d 861. At trial, the detective testified that he explained to Valdez that he "had a search warrant" for the phone, that he "was asking for [Valdez's] [passcode]," and that Valdez responded by "refus[ing] to give [the detective] the [passcode]." Neither the State nor Valdez questioned the detective about the details of this exchange—like whether he asked Valdez to verbally tell him the passcode, to physically demonstrate the swipe pattern, or to input the

passcode and hand over the unlocked phone. Nevertheless, we agree with the court of appeals that the best reading of the record is that the detective asked Valdez to tell him the passcode to the phone. The detective testified that he "asked for" the passcode and that Valdez refused "to give [him] the [passcode]." And the State has not challenged the court of appeals' reading of the record on certiorari. We therefore proceed with the understanding that the first scenario discussed above applies here: that the police officer asked Valdez to provide the passcode itself and did not ask Valdez to unlock the phone and then hand it over.

***10** ¶50 Although this case involves the oral provision of a passcode, the State applies the United States Supreme Court's act-of-production jurisprudence. The State argues that providing a memorized passcode to a cell phone is more akin to handing over a physical key than providing the combination to a wall safe. The State explains that all phone passcodes rely on encryption, which makes a message secret using an algorithm. To decrypt it is to reveal the secret using a "key" derived from the encryption algorithm. (Citing David W. Opderbeck, *The Skeleton in the Hard Drive: Encryption and the Fifth Amendment*, 70 FLA. L. REV. 883, 885 (2018).) The State further explains that a "decryption key is simply the mirror image of the encryption algorithm." And since it has "no use or meaning but to decrypt that set of data, returning it to readable form," "it lacks 'semantic content and is entirely functional.' " (Quoting Opderbeck, *supra*, at 916.) And the State reasons that since a passcode is functionally a key, "[a]ll Valdez would have been compelled to do was to open the door to [the police]." The State queries, "If a person opens the door to a home that police have a warrant to search, how has he

testified?" On this basis, the State argues that turning over a passcode is like handing over a physical key, which is a non-testimonial act of production.

¶51 While we recognize that communicating a passcode to the police and physically providing an unlocked phone to the police may be functionally equivalent in many respects, this functional equivalency is not dispositive under current Fifth Amendment jurisprudence. We conclude that the act-of-production analytical framework makes sense only where law enforcement compels someone to perform an *act* to unlock an electronic device. Where an act is involved, the act-of-production analysis teases out whether the act implicitly communicates information and, therefore, has testimonial value.[10] But where a suspect is asked

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[10] *See, e.g.*, *In re Grand Jury Duces Tecum Dated Mar. 25, 2011*, 670 F.3d 1335, 1341 (11th Cir. 2012) (applying the act-of-production doctrine in the context of a court order "to compel [an individual] to decrypt and hand over the contents of" certain hard drives); *Commonwealth v. Gelfgatt*, 468 Mass. 512, 11 N.E.3d 605, 611 (2014) (analyzing whether "compelling the defendant to enter the key to encryption software on various digital media storage devices" compelled a "testimonial communication" under the act-of-production doctrine); *State v. Stahl*, 206 So. 3d 124, 133 n.9 (Fla. Dist. Ct. App. 2016) (applying the act-of-production doctrine where "[n]either the State nor [the defendant] addresse[d] the State's request as anything but an act of production," but noting "it [was] not entirely clear from the record whether the State want[ed] [the defendant] to testify to the passcode or to enter it into the phone," and that "[i]f the former, the State's request could [have] be[en] considered under the traditional analysis of the self-incrimination privilege—that of verbal communications"); *Seo v. State*, 148 N.E.3d 952, 954 (Ind. 2020) (applying the act-of-production doctrine where a warrant "compelled [the defendant] to unlock [a] device and stated [the defendant] would be subject to the contempt powers of the court if she failed to do so" (cleaned up)).

to provide their passcode to law enforcement, the act-of-production analysis is not useful. Directly providing a passcode to law enforcement is not an "act." It is a statement. There is no need to tease out whether the statement implicitly communicates information to determine whether it has testimonial value. The statement explicitly communicates information from the suspect's own mind. Accordingly, it is a traditional testimonial communication. And there is no need to resort to the act-of-production framework.

¶52 Notably, scholars appear to recognize this fundamental distinction. For example, in limiting the scope of one of his articles, Orin S. Kerr focused his discussion on "the Fifth Amendment framework for compelling *acts of decryption* by entering a password without disclosing it to the government" because "[c]ompelled use of biometrics and *compelled disclosure* of passwords raise different Fifth Amendment issues." Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 TEX. L. REV. 767, 768 n.5 (2019) (emphasis added).

***11** ¶53 And in another article, Kerr and Bruce Schneier discussed the various ways that law enforcement might obtain access to the encrypted contents of locked cell phones. They observed that in one method, "the government might seek an order requiring a person to disclose [a passcode] to the government." Orin S. Kerr & Bruce Schneier, *Encryption Workarounds*, 106 GEO. L.J. 989, 1001 (2018). But they noted that "[t]he primary barrier to this method is the Fifth Amendment privilege against self-incrimination." *Id.* They explained that "[w]hen the government uses the threat of legal punishment to compel an individual to divulge a [passcode], the government is seeking to compel testimony. The person is being forced to go into

his memory and divulge his recollection of the [passcode]." *Id.* at 1001–02 (cleaned up).

¶54 In this same article, shifting to compelled decryption specifically, Kerr and Schneier posit that "the government might instead order individuals to produce a decrypted device. Investigators typically provide the person with a locked device, and the person can comply with the order by entering the [passcode] without disclosing it to the government." *Id.* at 1002. The authors state that "[t]he Fifth Amendment once again provides the legal framework, although the standard for compelled *acts of decryption* may be different than the standard for *disclosing* a [passcode]." *Id.* (emphasis added) (footnote omitted). And they continued, stating that "[c]ourts have analyzed compelled acts of decryption under the act of production doctrine .... [where] an act is testimonial for what it *implicitly* communicates about a person's state of mind." *Id.* (emphasis added).

¶55 Another scholar, Laurent Sacharoff, has referred to this type of implicit communication as "quasi testimony" because the "inadvertent communication does not entirely resemble ordinary speech." Laurent Sacharoff, *Unlocking the Fifth Amendment: Passwords and Encrypted Devices*, 87 FORDHAM L. REV. 203, 218 n.98 (2018). Indeed, the term "reminds us that the [Supreme] Court affords act-of-production testimony less protection under the Fifth Amendment than it does to full-fledged oral or written testimony." *Id.* To Sacharoff, this discrepancy in protection is logical because requiring a suspect to verbally state a passcode to the government "directly involve[s] testimony in its purest form and therefore should trigger direct Fifth Amendment protections." *Id.* at 223. Accordingly,

"stating a password to authorities falls within this core protection" of the Fifth Amendment. *Id.* at 224.

¶56 Sacharoff provides a useful example that may help illuminate the distinction. *See id.* at 225. Assume that a criminal suspect has the passcode to their desktop computer written down on a sticky note in their filing cabinet at home. Further assume that in seeking to obtain files on the suspect's desktop computer in an ongoing criminal investigation into the suspect, the government subpoenas the suspect to produce any documents with the password to the computer. As Sacharoff points out, while "such compulsion does not directly violate the Fifth Amendment because the person voluntarily created the document before the subpoena and has thus not been compelled[,] ...the Fifth Amendment may protect against such compulsion if the *act* of producing [the sticky note] with the password would, itself, be testimonial." *Id.* This is because by producing the sticky note, the suspect "implicitly testifies that the number written there *is* a password and that it is a password for *this* device." *Id.* "In other words, [the suspect] authenticates the content by producing it." *Id.* But if the suspect had been compelled to *say* their computer password to the government, there would be no need to use the act-of-production doctrine to determine if the communication was testimonial—such a communication is testimony in its traditional form, commanding protection under the Fifth Amendment.

***12** ¶57 Here, Valdez was asked to verbally communicate his passcode to police—a traditional testimonial statement. So while speaking a passcode and turning over an unlocked phone may be equivalent in many respects, they are not the same for Fifth Amendment purposes. Accordingly, we conclude that the act-of-

production jurisprudence does not apply to the facts here. There is no need for us to determine whether any physical act of producing evidence has sufficient testimonial value, as we are dealing with traditional testimony, which would have directly conveyed information to the government.

¶58 Therefore, we agree with the court of appeals that Valdez's statement of his passcode to the detective would have been testimonial under the Fifth Amendment.

II. THE FOREGONE CONCLUSION EXCEPTION DOES NOT APPLY

¶59 The State next argues that even if Valdez's statement of his passcode was testimonial, the Fifth Amendment still did not protect his refusal to provide the passcode under the foregone conclusion exception. We disagree with the State's invocation of the foregone conclusion exception in these circumstances. We conclude that it applies only in act-of-production cases.

¶60 The foregone conclusion exception was first articulated by the Supreme Court in *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). In *Fisher*, taxpayers under investigation for violations of federal tax laws obtained certain tax documents created by their accountants and subsequently transferred the documents to their attorneys in light of the criminal investigation. *Id.* at 393–94, 96 S.Ct. 1569. After learning the whereabouts of the tax documents, the government subpoenaed the attorneys to turn them over. *Id.* at 394, 96 S.Ct. 1569. The taxpayers sought to prevent their attorneys from turning over the documents, arguing that such action would

violate their Fifth Amendment right against self-incrimination. *Id.* at 395, 96 S.Ct. 1569.

¶61 In its analysis, the Court first acknowledged that "[t]he act of producing evidence in response to a subpoena ... has communicative aspects of its own," including a concession of "the existence of the papers demanded[,] ... their possession or control by the [suspect]," and the suspect's belief "that the papers are those described in the subpoena." *Id.* at 410, 96 S.Ct. 1569. Accordingly, the act of turning over documents requested in a subpoena may itself be "testimonial" under the Fifth Amendment. *Id.* Nonetheless, on the facts of *Fisher*, the Court found it "doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment." *Id.* at 411. The Court reasoned that because the government already knew the tax documents existed and that the lawyer possessed the documents, any information regarding the existence and possession of the documents was "a foregone conclusion" and the act of turning them over "add[ed] little or nothing to the sum total of the Government's information ...." *Id.* In other words, the attorneys' act of gathering the documents and giving them to the government did not give the government any information it did not already have. To the Court, "[t]he question [was] not of testimony but of surrender." *Id.* (cleaned up). Thus, the Court held that while the act of turning over documents under a subpoena may have testimonial aspects, on the facts of *Fisher*, the surrender of the tax documents was not "testimonial" for Fifth Amendment purposes.

¶62 As the court of appeals noted, the Supreme Court has only mentioned the foregone conclusion exception on one other occasion since its introduction in 1976. In

United States v. Hubbell, 530 U.S. 27, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000), the government subpoenaed a suspect to turn over different categories of documents to determine if the suspect had complied with the terms of a prior plea agreement. *Id.* at 30–31, 120 S.Ct. 2037. The suspect initially asserted his Fifth Amendment right against self-incrimination to avoid disclosing any documents that may have been responsive to the subpoena. *Id.* at 31, 120 S.Ct. 2037. But the suspect ultimately complied and turned over a number of documents to the government. *Id.* Upon review, the government discovered previously unknown information in the documents, which led to new tax-related charges against the suspect. *Id.* at 31–32, 120 S.Ct. 2037. Notably, the government admitted that when it served the subpoena, it was not investigating the suspect for any tax crimes and was unaware of which documents existed, which documents were in the suspect's possession, or what information those documents contained. *Id.* at 32, 120 S.Ct. 2037.

***13** ¶63 First, the Court held that the suspect's act of turning over the documents was testimonial, as it relayed to the government information regarding the existence and location of the documents requested by the government. The Court then referred back to the "foregone conclusion" language it had used in *Fisher*, stating that,

> Whatever the scope of this "foregone conclusion" rationale, the facts of this case plainly fall outside of it. While in *Fisher* the Government already knew that the documents were in the attorneys' possession and could independently confirm their existence and authenticity through the accountants

> who created them, here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the ... documents ultimately produced by [the suspect].

Id. at 44–45, 120 S.Ct. 2037. So unlike in *Fisher*, the government in *Hubbell* had no independent knowledge of the information it was seeking such that any information conveyed in the act of production would have been a foregone conclusion.

¶64 The limited context in which the Supreme Court has discussed the foregone conclusion exception (or "foregone conclusion rationale," as *Hubbell* put it) demonstrates its narrow focus. As the court of appeals stated below, "[t]he [Supreme] Court has never applied the exception outside of the context of assessing the testimoniality of a nonverbal act of producing documents." *State v. Valdez*, 2021 UT App 13, ¶ 42, 482 P.3d 861.

¶65 We agree with the court of appeals. We view the foregone conclusion exception as being inapplicable outside of the act-of-production context. Notably, the Supreme Court has not applied the exception to verbal statements. And it has not extended its reach beyond the act-of-production context. Accordingly, we conclude that the foregone conclusion exception does not apply here.

III. THE STATE'S TRIAL COMMENTARY IS NOT PERMISSIBLE AS A "FAIR RESPONSE" TO AN ARGUMENT VALDEZ INITIATED

¶66 Finally, in response to our supplemental briefing order, the State argues that even if Valdez had a Fifth

Amendment right to refuse to provide his passcode, the State nonetheless did not violate Valdez's rights by commenting on his silence at trial. It asserts that such commentary was a fair response to Valdez putting the contents of the phone at issue. We view the record otherwise.

¶67 The United States Supreme Court has held that while a defendant's silence will generally carry no penalty at trial, the defendant is not allowed to use their Fifth Amendment silence as a "sword" rather than a "shield." *United States v. Robinson*, 485 U.S. 25, 32, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988) (quoting *United States v. Hasting*, 461 U.S. 499, 515, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) (Stevens, J., concurring)). Accordingly, in the trial testimony context, the Court has stated that "where ... the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the [Fifth Amendment]." *Id.*[11]

***14** ¶68 But, assuming the rationale of *Robinson* applies here, we cannot say that Valdez unfairly used his

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[11] In *United States v. Robinson*, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988), defense counsel made numerous statements criticizing the government for not giving the defendant a fair opportunity to explain the actions for which he was being prosecuted. *Id.* at 27–28, 108 S.Ct. 864. In response, the prosecutor pointed out that the defendant had the opportunity to tell his story on the witness stand. *Id.* at 28, 108 S.Ct. 864. The Supreme Court concluded that the prosecutor's commentary was permissible because it "did not treat the defendant's silence as substantive evidence of guilt, but instead referred to the possibility of testifying as one of several opportunities which the defendant was afforded, contrary to the statement of his counsel, to explain his side of the case." *Id.* at 32, 108 S.Ct. 864.

silence as a "sword" and a "shield." It was the State that first put the contents of the text messages at issue. In its case in chief, the State introduced evidence through Jane that Valdez had sent her text messages to coordinate their meeting.

¶69 And before Valdez raised any issue about the content of the text messages, the State elicited testimony in its case in chief that the police could not access the contents of Valdez's cell phone because he had refused to provide the passcode. On direct examination, the prosecutor asked the detective: "[A]re you familiar with why you were unable to access the data" contained in the phone? After the district court overruled Valdez's Fifth Amendment objection to the question, the detective answered that Valdez "refused to give me the [passcode] and just told me to destroy the phone." It was after this, in his case in chief, that Valdez elicited testimony from his ex-wife characterizing the text exchange as sexual in nature.

¶70 The State argues that the detective's testimony does not implicate the Fifth Amendment because it was a "mere mention" of Valdez's refusal to provide his passcode and not an attempt to use his silence against him. (Citing *State v. Harmon*, 956 P.2d 262, 268–69 (Utah 1998).) The State asserts that it did not use Valdez's silence against him until its closing, which occurred *after* Valdez's elicitation of his ex-wife's testimony regarding the text messages.

¶71 But we agree with the court of appeals that the import of the detective's testimony was to suggest that Valdez *should have* provided his passcode and was obstructing law enforcement's investigation by refusing to do so. *State v. Valdez*, 2021 UT App 13, ¶ 25, 482 P.3d 861 ("The State implied at trial that Valdez had

an obligation to provide the swipe code to the investigating officers, and that he had no right to refuse."). In countering Valdez's objection to the detective's testimony, the State did not argue to the district court that it needed to admit the testimony as a response to an issue Valdez had raised. Rather, the State pointed out that the detective had a warrant to search the phone, and it argued that "[t]he jury ha[d] a right to know why the officers were unable to access the phone when there could have been evidence very pertinent to the case."

¶72 On these facts, the State's elicitation and use of Valdez's refusal at trial do not constitute a permissible "fair response" to an argument initiated by Valdez.

CONCLUSION

¶73 We hold that verbally providing a cell phone passcode to law enforcement is testimonial for Fifth Amendment purposes. Since the disclosure of a passcode involves traditional oral testimony, the act-of-production analysis urged by the State does not apply. And for the same reasons, the foregone conclusion exception is inapplicable. This exception has been discussed twice by the Supreme Court, and both times, the case involved the compelled *act* of producing evidence. The Supreme Court has not extended the exception to cover verbal testimonial statements, and we see no justification to do so either. Finally, the State cannot avail itself of the Supreme Court's "fair response" precedent because, even if such precedent applies, the State elicited testimony about the text messages and Valdez's refusal to provide his passcode before Valdez put on evidence about the contents of the text messages on his phone. Accordingly, Valdez did

not use his prior silence as both a "sword" and a "shield."

***15** ¶74 We note that the court of appeals found that the Fifth Amendment violation in this case was not harmless beyond a reasonable doubt and that Valdez's conviction should therefore be vacated. The State has not challenged those rulings on certiorari.

¶75 We affirm the court of appeals and remand to the district court for further proceedings in accordance with this opinion.

At the initial oral argument in this matter, Justice Lee and Justice Himonas did not sit due to their retirements. District Court Judges John J. Walton and Matthew L. Bell sat.

Following her appointment to the Court, Justice Hagen sat for Judge Matthew L. Bell.

Having recused herself, Justice Pohlman did not participate herein; District Court Judge John J. Walton sat.

All Citations

--- P.3d ----, 2023 WL 8635197, 2023 UT 26

APPENDIX B

482 P.3d 861
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Alfonso Margo VALDEZ, Appellant.

No. 20181015-CA

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Filed February 11, 2021

Synopsis

Background: Defendant who refused to provide police detective with the passcode to unlock his cell phone was convicted in the Second District Court, Ogden Department, Joseph M. Bean, J., of kidnapping, robbery, and aggravated assault, stemming from incident in which he allegedly forced his ex-girlfriend into a vehicle and attacked her. Defendant appealed.

Holdings: The Court of Appeals, Harris, J., held that:

communicating passcode would have been testimonial, thus triggering Self-Incrimination Clause of Fifth Amendment;

foregone conclusion exception to testimoniality was inapplicable;

State utilized defendant's refusal as invitation for jury to infer guilt, thus violating privilege against self-incrimination; and

violation of privilege against self-incrimination was not harmless, thus requiring reversal of convictions.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion; Trial or Guilt Phase Motion or Objection.

***864** Second District Court, Ogden Department, The Honorable Joseph M. Bean, No. 171901990.

Attorneys and Law Firms

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Judge Ryan M. Harris authored this Opinion, in which Judges Gregory K. Orme and Jill M. Pohlman concurred.

Opinion

HARRIS, Judge:

***865** ¶1 A jury convicted Alfonso Margo Valdez of kidnapping, robbery, and aggravated assault, after his ex-girlfriend (Ex-Girlfriend) testified that he forced her into his car with a gun, threatened her, hit her with the gun, cut her face with a knife, and stole her purse and phone. Valdez appeals his convictions, claiming that the trial court incorrectly—and in violation of the Fifth Amendment to the United States Constitution—allowed the State to imply guilt from Valdez's refusal to provide the swipe code to unlock his cell phone. Valdez also asserts that his attorney rendered ineffective assistance and that the court improperly excluded a witness's testimony. We find merit in Valdez's Fifth Amendment argument, reverse his convictions on that basis, and remand for further proceedings.

BACKGROUND[1]

¶2 Valdez and Ex-Girlfriend dated and cohabited for a time in 2017 and, as Ex-Girlfriend recounted it, their relationship was a volatile one. She described Valdez as accusatory and violent, sometimes hitting and choking her, other times confining her in a locked room and once beating her so severely that her injuries required hospitalization. After their relationship ended, Ex-Girlfriend moved out of Valdez's apartment, but Valdez continued to contact her via phone and text message. Ex-Girlfriend maintained that, after they parted ways, she largely tried to keep her distance from Valdez but acknowledged that she had willingly seen him "a couple times" after their breakup, but before the incident at issue here occurred.

¶3 About two months after their relationship ended, Valdez sent Ex-Girlfriend a text message telling her he had some mail to give her and asking her to meet him. Although Ex-Girlfriend had concerns about meeting Valdez, she thought it was "nice of him" to reach out for the purpose of passing along her mail, and she "had hope" that their meeting "would be decent." Ex-Girlfriend told Valdez to meet her early one morning near her workplace after she finished her night shift. When Valdez pulled up in an SUV, Ex-Girlfriend approached the passenger side of the vehicle. She later testified that when she leaned into the open passenger-side window to speak to Valdez, he

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[1] "When reviewing a jury verdict, we examine the evidence and all reasonable inferences in a light most favorable to the verdict, reciting the facts accordingly." *State v. Painter*, 2014 UT App 272, ¶ 2, 339 P.3d 107 (quotation simplified).

pulled out a revolver and told her to get in the car. Frightened, she complied, and Valdez began driving.

¶4 After Ex-Girlfriend got in the vehicle, Valdez told her "how stupid [she] was" for agreeing to meet him before saying, "I hope you have talked to your kids today, because you are not going to get away from me this time." Valdez also pulled out a twelve-inch knife, which he wedged, blade pointed upward, between Ex-Girlfriend and the vehicle's center console. Ex-Girlfriend testified that, as Valdez drove, he held the gun in his left hand, hit her in the head with it, and struck her "several times in the head and face" with his other hand. He also demanded that she give him her phone and purse, which she did, and that she take off her clothes, a demand she perceived as an attempt to prevent her from escaping. Other than beginning to unlace her shoes, she did not remove her clothing.

¶5 At one point, while the vehicle was stopped, Valdez dislodged the knife and ran it down Ex-Girlfriend's face, cutting her lip. Ex-Girlfriend testified that, soon thereafter, she went into "survival mode," and began attempting to get out of the vehicle, an endeavor Valdez impeded by putting his hand around her throat and holding on to her hair. Eventually, Ex-Girlfriend was able to spin out of Valdez's grip, open the car door, and exit the vehicle. She then ran toward nearby houses, first knocking on a door and receiving no answer, and then attempting to flag down a passing vehicle. Finally, Ex-Girlfriend noticed a woman (Witness) standing on a nearby front porch and made her way toward that house.

¶6 Ex-Girlfriend explained to Witness that she was trying to escape from Valdez, and that Valdez had a knife and a gun and was ***866** trying to kill her. Ex-

Girlfriend did not mention any injuries, and Witness did not see any blood on Ex-Girlfriend. Witness called the police, and a detective (First Detective) soon arrived and took statements from both Witness and Ex-Girlfriend. Much of First Detective's encounter with Witness and Ex-Girlfriend was recorded on First Detective's body camera. Witness told First Detective that she had seen Valdez's vehicle stop in front of her house, and she could tell that Valdez and Ex-Girlfriend were arguing but could not see a knife or gun. During her trial testimony, Witness described watching the vehicle drive a few houses down the street, and observing Ex-Girlfriend apparently trying to get out of the vehicle, with her legs hanging out of the car; from Witness's vantage point, it appeared that Valdez was attempting to prevent Ex-Girlfriend from leaving the vehicle. A few hours later, another detective (Second Detective) interviewed Ex-Girlfriend at the police station; this interaction was also recorded.

¶7 The next day, police arrested Valdez and seized, among other things, an Android phone discovered on his person at the time of his arrest. Police later obtained a warrant to search the phone, but were unable to access its contents because they did not know the code to unlock the phone, which in this case was a "swipe code," a "nine dot pattern." According to the officer assigned to try to access the phone's contents, this particular phone would "only allow so many attempts" to unlock it "before completely locking you out of the phone or wiping or resetting the device and losing all of the data." After obtaining a warrant to search the phone, officers asked Valdez "for his pass code" and explained that if he did not provide it then they would attempt "maneuver[s]" with the phone that could "destroy[ ]" it. An officer testified that

Valdez "refused to give [him] the pass code and just told [him] to destroy the phone." Officers were ultimately unable to access the phone's contents.

¶8 After investigation, the State charged Valdez with aggravated assault, aggravated kidnapping, and aggravated robbery. The case first proceeded to a jury trial in August 2018, but the court declared a mistrial when the State's first witness—Ex-Girlfriend—told the jury, in contravention of a pretrial order, that Valdez had previously spent time in prison. About two months later, a new jury was empaneled and a second trial was held; this trial spanned five trial days and included testimony from eleven witnesses.

¶9 In the second trial, the State called as its first witness First Detective, who gave a lengthy and detailed narrative account of his interaction with Ex-Girlfriend at Witness's house on the day of the incident. After First Detective offered his observations of Ex-Girlfriend's appearance—that she had a small cut on her top lip and a broken hair clip, but no other apparent injuries—the prosecutor asked him whether Ex-Girlfriend had "provide[d] any details about how [the] kidnapping had occurred." First Detective answered in the affirmative, and spent the next five transcript pages describing in narrative fashion what Ex-Girlfriend had said to him about her encounter with Valdez. As First Detective began to describe Ex-Girlfriend's account of how she escaped from Valdez's vehicle, Valdez's attorney lodged a hearsay objection, stating that First Detective's testimony may have "fit within an [exception] up until this point," but that his description of her escape from the vehicle was no longer "showing any effect on this officer and how he conducted the investigation." The court overruled the objection, explained to the jury that the testimony was

admissible "under a hearsay exception where it tells us why the officer acted in his investigation the way he did," and instructed the jury that First Detective's testimony in this vein was not to be considered "for the truth of the matter asserted." First Detective then completed his narrative description of what Ex-Girlfriend had told him, taking another two pages of trial transcript to do so. First Detective also described his interaction with Witness, but in much less detail.

¶10 After First Detective's testimony, Witness and Ex-Girlfriend testified about the incident, as recounted above. The State also called two additional police officers, who—among other things—testified that police were never able to find Ex-Girlfriend's phone or any knife, and located only a starter pistol, ***867**[2] but no actual handgun, during a search of Valdez's residence.

¶11 The State called Second Detective as its final witness. One of the other officers had already testified that police were unable to access the contents of Valdez's phone, but had not described Valdez's refusal to provide the swipe code. As Second Detective began describing Valdez's refusal, Valdez's attorney objected, asserting that Valdez had a "Fifth Amendment [r]ight" not to provide the swipe code, and that the State should not be able to present any evidence of Valdez's refusal to provide it. The court overruled the objection, and allowed Second Detective to inform the jury that Valdez "refused to [provide] the passcode and just told [Second Detective] to destroy the phone."

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[2] According to one of the testifying officers, a "starter pistol" is "a gun that shoots blanks" and is used to ceremonially mark the start of races; it is not capable of firing actual bullets.

¶12 The State also asked Second Detective about interviewing Ex-Girlfriend at the police station, and it played for the jury a video recording of the entire interview. Second Detective testified, without objection, that he had received training on how to "detect deception" on the part of interviewees, and he explained that one of his techniques for detecting deception—and one that he used with Ex-Girlfriend in this case—was to ask the interviewee to tell his or her story in reverse. He explained: "If you can remember [your story] in reverse," then it is "most likely, in [my] experience and training, ... the truth." And he further testified that, when he asked Ex-Girlfriend to give her account in reverse, she was able to do so in a "consistent" manner. On cross-examination, Second Detective acknowledged that, while it took Ex-Girlfriend forty-five minutes to tell her story chronologically, it took her only a minute or two to recap her account in reverse. Valdez's attorney then asked Second Detective whether that one-minute reverse recap was "sufficient for [him] to validate everything that [Ex-Girlfriend] said," and Second Detective responded in the affirmative.

¶13 On redirect examination, the State asked Second Detective if he expected the reverse telling to be as detailed as the original telling, and he explained that he did not. The State then asked him for his "assessment" of Ex-Girlfriend's testimony, and he stated that he "believe[d] she was telling [him] the truth," and that he reached that conclusion because her "story matched what she told [First Detective] on-scene," "matched what she told [W]itness," and "was consistent with" the account she gave in "reverse order." After a few more questions, the State finished its redirect examination, and the court—without being

prompted—asked counsel to approach the bench. After a sidebar discussion, the court issued a "corrective instruction," explaining to the jury that evidentiary rules "bar[ ] the admission of ... expert testimony as to the truthfulness of a witness on a particular occasion," and prevent one witness from "vouch[ing] for the credibility of another." The court struck Second Detective's testimony "as far as saying that [Second Detective] believed the alleged victim in this matter was telling the truth," and instructed the jury to "disregard ... that specific part of [Second Detective's] testimony as far as his belief that [Ex-Girlfriend] was telling the truth." The court also later gave the jury a written instruction, stating as follows: "You are instructed to disregard the portion of the testimony of [Second Detective] that deals with his opinion of the truthfulness of the alleged victim in this case."

¶14 After the State rested, Valdez moved for a mistrial on the basis that Second Detective, in describing his interview of Valdez, testified that he had read Valdez his *Miranda*[3] rights and that Valdez had thereafter refused to answer further questions. The court denied the motion, but offered to give an instruction informing the jury of a defendant's right to remain silent. Valdez's counsel then asked to "amend [his] motion to include ... the statement of [Valdez] failing to comply with [the officers'] request to provide the code for the phone." After hearing argument from the State, the court stated that "the Fifth Amendment does not necessarily protect" refusing to "giv[e] a pass code to a ***868** phone," and that it was "inclined" to

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

deny Valdez's motion. However, the court did not make a definitive ruling, stating that it would "give [the matter] some thought" and invite further discussion on the issue "when we do jury instructions." But neither the court nor the parties brought the matter up again, and the court never made a final ruling on Valdez's "amend[ed]" motion for mistrial.

¶15 Valdez then called several witnesses of his own, although he elected not to testify himself. The first was his ex-wife (Ex-Wife), who lived next door to Valdez, in the same duplex, and shared a wall with him. During her testimony, Ex-Wife testified that the apartment walls were thin, and she never heard screaming, yelling, or any signs of trouble coming from Valdez's apartment, even during the time that Ex-Girlfriend lived with Valdez; this testimony was corroborated by testimony from Valdez's daughter, who lived with Ex-Wife. Ex-Wife also characterized Ex-Girlfriend as a "guest that never left" and was "hard to get rid of." Ex-Wife was acquainted with Ex-Girlfriend not only because of their common association with Valdez, but also because she and Ex-Girlfriend worked for the same company. Ex-Wife testified that on the morning of the incident in question, while both of them were at work, Ex-Girlfriend had shown her a series of text messages between Valdez and herself that were "sexual" and appeared to indicate that the two of them wanted to "make[ ] up."

¶16 Valdez also attempted to call his aunt (Aunt) to the stand. Aunt was prepared to testify that—contrary to Ex-Girlfriend's assertions that she largely avoided Valdez after their breakup—Ex-Girlfriend had, in fact, often attempted to see Valdez in the month leading up to the incident. Valdez proffered that Aunt could testify that, while Valdez was at

Aunt's house performing odd jobs after he and Ex-Girlfriend had broken up, Aunt had seen Ex-Girlfriend parked outside of the house waiting for Valdez, and that Ex-Girlfriend had done this uninvited. Valdez's counsel argued that Aunt's testimony was admissible pursuant to rule 608(c) of the Utah Rules of Evidence "to establish a bias" and "to establish that there may be a motive [for Ex-Girlfriend] to misrepresent her testimony of how terrified that she was." Counsel made only the rule 608(c) argument, and did not assert that Aunt's testimony was admissible as ordinary impeachment evidence. The trial court refused to allow Aunt to testify, rejecting counsel's rule 608(c) argument.

¶17 After Valdez rested, the court instructed the jury. Valdez asked the court to provide instructions about lesser-included offenses regarding the aggravated kidnapping and aggravated robbery counts, but did not ask for a lesser-included-offense instruction with regard to the aggravated assault count. The court instructed the jury as Valdez requested.

¶18 During closing argument, the State emphasized (among other things) Valdez's refusal to disclose the swipe code to his phone, and did so in connection with an attempt to rebut Ex-Wife's testimony about the sexual text messages. Specifically, the prosecutor argued as follows:

> Now, you heard [Ex-Wife] say that she saw some texts. They were going to get back together and do sexual things. The State was very interested. You heard testimony from [several] witnesses about the efforts that were taken to get into [Valdez's]

> phone to determine what, if any, communication happened between the two of them. ... The only way [the State] could get into that phone to see what these text messages said was by getting the code from [Valdez]. And he chose to decline to do that.
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> ....
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> The [S]tate made and took a lot of effort to see what communications had gone on between them. Instead of providing any proof of text messages, they bring in ... [Ex-Wife] to say that she, we didn't have a good relationship with [Ex-Girlfriend], happened to see the text between them was of a sexual nature. Think of the motive she had to lie. Her investment in this case. Ladies and gentlemen, use your common sense. Those texts [aren't[4]] here today.

***869** ¶19 At the conclusion of the trial, the jury convicted Valdez of aggravated assault, but declined to convict him of aggravated kidnapping and aggravated robbery, instead convicting him of lesser-included offenses, namely, kidnapping and robbery.

ISSUES AND STANDARDS OF REVIEW

¶20 Valdez now appeals, and asks us to consider several issues. We first address Valdez's assertion that

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[4] The record reads, "Those texts (inaudible) here today." From context, we infer that the inaudible phrase is "aren't."

his rights under the Fifth Amendment to the United States Constitution were violated when the trial court allowed Second Detective to testify about Valdez's refusal to provide the swipe code to his phone, and when the State argued therefrom that the jury should infer that there existed no "make up" texts between Valdez and Ex-Girlfriend. Because Valdez raises a constitutional claim, we review the trial court's conclusions for correctness. *State v. Maestas*, 2012 UT 46, ¶ 95, 299 P.3d 892.

¶21 In addition to his constitutional claim, Valdez raises several other issues. He claims that his attorney rendered constitutionally ineffective assistance of counsel in several respects, including when he (a) failed to object to Second Detective's testimony pertaining to the veracity of Ex-Girlfriend's statements, and (b) failed to object to the length and detail with which First Detective described the events leading to his investigation of the incident. And he claims that the trial court erred by refusing to allow Aunt to testify. Because we find merit in Valdez's Fifth Amendment argument and reverse on that ground, we need not reach the merits of these other arguments, although we provide some limited guidance in the hope it may be useful on remand.

ANALYSIS

I.

¶22 We first address Valdez's claim that his Fifth Amendment rights were violated when the State presented evidence that he refused to provide the swipe code to his cell phone, and then relied on that evidence in urging the jury to infer that there were no conciliatory and sexual text messages between Valdez and Ex-Girlfriend. We begin by engaging in a general

discussion of governing Fifth Amendment legal principles. We then confront the particular question of whether communicating a cell phone swipe code to law enforcement is a "testimonial" act protected by the Fifth Amendment, and conclude that it is. Next, we analyze the applicability of the so-called "foregone conclusion exception" to testimoniality, and conclude that the exception does not apply in this case. We then determine that the State made more than an innocuous use of the evidence, and that the Fifth Amendment was therefore violated in this case. Finally, we conclude that the error was not harmless.

A. General Fifth Amendment Principles

¶23 The Self-Incrimination Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself," and creates a privilege that protects a defendant "against being incriminated by his own compelled testimonial communications," *Doe v. United States*, 487 U.S. 201, 207, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988). This privilege was created "to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him," as had been done in historical "ecclesiastical courts and the Star Chamber," where inquisitors would "put[ ] the accused upon his oath and compel[ ] him to answer questions designed to uncover uncharged offenses, without evidence from another source." *Id.* at 212, 108 S.Ct. 2341. The amendment "reflects a judgment that the prosecution should not be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Id.* (quotation simplified); *see also Estelle v. Smith*, 451 U.S. 454, 462, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (noting that the

government is typically required to gather evidence through "the independent labor of its officers, not by the simple, cruel expedient of forcing it from [a suspect's] own lips" (quotation simplified)).

***870** ¶24 Many communications fall under the ambit of the Fifth Amendment's protection, *see State v. Gallup*, 2011 UT App 422, ¶ 14, 267 P.3d 289, but the Fifth Amendment does not protect defendants from disclosures of every kind, *see Doe*, 487 U.S. at 212, 108 S.Ct. 2341. Rather, the amendment "protects a person only against being incriminated by his own compelled testimonial communications." *Id.* at 207, 108 S.Ct. 2341 (quotation simplified). Thus, courts have often stated that communications merit Fifth Amendment protection only if they share three characteristics: (1) the communication is compelled, (2) the communication is testimonial, and (3) the communication is incriminating. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004) (stating that, in order for a communication to trigger Fifth Amendment protections, it "must be testimonial, incriminating, and compelled"); *see also Commonwealth v. Davis*, 220 A.3d 534, 543 (Pa. 2019) ("To invoke the Fifth Amendment privilege against the forced provision of information, a defendant must show (1) the evidence is self-incriminating; (2) the evidence is compelled; and (3) the evidence is testimonial in nature."), *cert. denied*, —— U.S. ——, 141 S. Ct. 237, 208 L.Ed.2d 17 (2020).

¶25 In this case—as in several similar cases, *see, e.g.*, *Doe*, 487 U.S. at 207, 108 S.Ct. 2341; *Davis*, 220 A.3d at 543—the elements of compulsion and incrimination are not contested. The State implied at trial that Valdez had an obligation to provide the swipe code to the investigating officers, and that he had no right to

refuse. And it has "long been settled that [the Fifth Amendment's self-incrimination] 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." *United States v. Hubbell*, 530 U.S. 27, 37, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000); *see also id.* at 38, 120 S.Ct. 2037 (stating that the Fifth Amendment protects "against the prosecutor's use of incriminating information derived directly or indirectly from the compelled testimony" of the defendant). Thus, even though the State might not have planned to introduce the actual swipe code into evidence, and even though the code was not itself evidence of a crime, that code could have led to the "discovery of incriminating evidence" on Valdez's phone, and therefore is properly categorized as at least indirectly "incriminating" for Fifth Amendment purposes. *See id.* at 37–38, 120 S.Ct. 2037.

¶26 In this case, the only contested element is whether providing the swipe code to officers would have been "testimonial," as that term is used in the Fifth Amendment context. The State contends that it would not or, at least, that an exception to testimoniality applies here. Valdez, by contrast, contends that any statement he might have made to police communicating the swipe code to them would have been testimonial in nature. We proceed to analyze these arguments.

B. Testimoniality

¶27 "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe*, 487 U.S. at 210, 108 S.Ct. 2341. The "touchstone" used to

mark whether a communication "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." *See In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1345 (11th Cir. 2012) (quoting *Curcio v. United States*, 354 U.S. 118, 128, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957)); *see also Doe*, 487 U.S. at 211, 108 S.Ct. 2341 ("It is the extortion of information from the accused, the attempt to force him to disclose the contents of his own mind, that implicates the Self-Incrimination Clause." (quotation simplified)). "Whatever else it may include, the definition of 'testimonial' must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the cruel trilemma" of "self-accusation, perjury, or contempt." *See Pennsylvania v. Muniz*, 496 U.S. 582, 596–97, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) (quotation simplified).

¶28 "The most common form" of testimonial communication "is verbal or written communications—the vast amount of which ***871** will fall within the privilege" provided by the Fifth Amendment. *Eunjoo Seo v. State*, 148 N.E.3d 952, 955 (Ind. 2020). Indeed, the United States Supreme Court has made clear that "[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts," and that therefore "[t]he vast majority of verbal statements thus will be testimonial." *See Doe*, 487 U.S. at 213, 108 S.Ct. 2341.

¶29 On the other hand, citizens may be compelled to take various nonverbal actions without implicating the Fifth Amendment's Self-Incrimination Clause. *See In re Grand Jury Subpoena*, 670 F.3d at 1345 (stating that "the Fifth Amendment privilege is not triggered

where the Government merely compels some physical act, i.e. where the individual is not called upon to make use of the contents of his or her mind," and where the State's request amounts to something much more like a compelled hand-off of "the key to the lock of a strongbox containing documents"). For instance, "a suspect may be compelled to furnish a blood sample, to provide a handwriting exemplar or a voice exemplar, to stand in a lineup, and to wear particular clothing." *Doe*, 487 U.S. at 210, 108 S.Ct. 2341 (quotation simplified); *see also Hubbell*, 530 U.S. at 35, 120 S.Ct. 2037. In instances like these, the government does not seek access to a suspect's mind, and the suspect by undertaking the action is "not required to disclose any knowledge he might have, or to speak his guilt." *See Doe*, 487 U.S. at 211, 108 S.Ct. 2341 (quotation simplified). Thus, nonverbal actions are often considered nontestimonial.

¶30 Likewise, "a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the [Fifth Amendment] privilege." *Hubbell*, 530 U.S. at 35–36, 120 S.Ct. 2037; *see also id.* at 36, 120 S.Ct. 2037 (stating that a person "could not avoid compliance with [a] subpoena served on him merely because the demanded documents contained incriminating evidence, whether written by others or voluntarily prepared by himself"). However, although voluntarily created documents are not themselves protected by the Fifth Amendment, its self-incrimination principles may be implicated when a suspect is asked to participate in the production of such documents, because "the act of production itself may implicitly communicate statements of fact" that the

government may not already know, such as the fact that the documents "existed, were in his possession or control, and were authentic." *Id.* at 36, 120 S.Ct. 2037 (quotation simplified); *see also Muniz*, 496 U.S. at 595 n.9, 110 S.Ct. 2638 (explaining that "nonverbal conduct contains a testimonial component whenever the conduct reflects the actor's communication of his thoughts to another"); *Fisher v. United States*, 425 U.S. 391, 410, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976) (providing that the "act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced").

¶31 In his noteworthy dissenting opinion in *Doe*, Justice Stevens offered an example of the difference between a verbal testimonial communication and a nonverbal nontestimonial action, stating that a person "may in some cases be forced to surrender a key to a strongbox containing incriminating documents," but that person cannot "be compelled to reveal the combination to his wall safe—by word or deed." *See* 487 U.S. at 219, 108 S.Ct. 2341 (Stevens, J., dissenting). The majority opinion in *Doe* agreed with Justice Stevens's formulation, stating that it did "not disagree with the dissent that '[t]he expression of the contents of an individual's mind' is testimonial communication," but held that the act of "compulsion" at issue in that case "is more like 'being forced to surrender a key to a strongbox containing incriminating documents' than it is like 'being compelled to reveal the combination to [a] wall safe.' " *Id.* at 210, 108 S.Ct. 2341 n.9 (majority opinion) (quoting *id.* at 219, 108 S.Ct. 2341 (Stevens, J., dissenting)). And in *Hubbell*, in a majority opinion authored by Justice Stevens, the Supreme Court fully endorsed the combination safe/strongbox key

distinction, holding that requiring a suspect to identify and assemble "the hundreds of documents responsive to the requests in [a] subpoena" was testimonial ***872** because it was "like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox." *See Hubbell*, 530 U.S. at 43, 120 S.Ct. 2037 (citing *Doe*, 487 U.S. at 210 n.9, 108 S.Ct. 2341). Thus, according to the United States Supreme Court, a statement—by word or deed—communicating a combination to a wall safe is testimonial, but the act of handing over a key to a strongbox is nontestimonial. *See Davis*, 220 A.3d at 547 ("[T]he Supreme Court has made, and continues to make, a distinction between physical production and testimonial production.").

¶32 There are several ways in which law enforcement officers might go about gaining access to a suspect's locked cell phone, once a search warrant for that phone has been procured. Among them are these: (a) asking the suspect to communicate the access code to law enforcement officers, or (b) asking the suspect to personally unlock the phone, whether through biometric means (e.g., a fingerprint) or through entry of numbers or a swipe pattern, and then turn over the unlocked phone. In scenario (a), the suspect is asked to tell the officers what the code is, the officers learn that code, and may later enter the code into the phone themselves; in scenario (b), by contrast, the suspect is not asked to, and does not, communicate the code to law enforcement officers.

¶33 Scenario (a) is very much akin to revealing the combination to a wall safe, and is dissimilar from surrendering the key to a strongbox. *See Hubbell*, 530 U.S. at 43, 120 S.Ct. 2037; *Doe*, 487 U.S. at 210 n.9, 108 S.Ct. 2341. Indeed, while we are aware of no Utah

law on this topic, various courts and commentators have recognized that, by asking a suspect to—orally or in writing—communicate the actual passcode to a cell phone, law enforcement officers seek a response that is testimonial in ways that simply turning over an unlocked phone is not, because such a request asks for the code itself. *See, e.g.*, *Davis*, 220 A.3d at 548 (explaining that "the revealing of a computer password is a verbal communication, not merely a physical act that would be nontestimonial in nature," and that "one cannot reveal a passcode without revealing the contents of one's mind"); *United States v. Kirschner*, 823 F. Supp. 2d 665, 669 (E.D. Mich. 2010) (noting that "forcing [a defendant] to reveal the password for the computer communicates that factual assertion to the government, and thus, is testimonial—it requires [a defendant] to communicate 'knowledge,' unlike the production of a handwriting sample or a voice exemplar" (quoting *Doe*, 487 U.S. at 217, 108 S.Ct. 2341)); *see also United States v. Spencer*, No. 17-CR-00259-CRB-1, 2018 WL 1964588, at *2 (N.D. Cal. Apr. 26, 2018) (stating that "the government could not compel [the defendant] to state the password itself, whether orally or in writing," but holding, on the facts of that case, that it could compel the defendant to unlock the phone); *State v. Pittman*, 367 Or. 498, 510, 479 P.3d 1028 (2021) (stating that "[t]he state could not compel defendant to reveal the passcode to the phone" because "[r]equiring her to do so would compel her to make an express verbal or written statement"); Laurent Sacharoff, *What Am I Really Saying When I Open My Smartphone? A Response to Orin S. Kerr*, 97 Tex. L. Rev. Online 63, 68 (2019) (debating whether the government can compel a suspect to turn over an unlocked phone, and not "whether the government can

compel a suspect to orally state, or write down, her passcode," because "[s]uch compulsion would violate the Fifth Amendment, as almost everyone including Kerr agrees"); Wayne R. LaFave et al., 3 *Criminal Procedure* § 8.13(a) (4th ed. 2020) (stating that "requir[ing] the subpoenaed party to reveal a passcode that would allow [the government] to perform the decryption ... would require a testimonial communication standing apart from the act of production").

¶34 In this case, Second Detective testified that he explained to Valdez that he "had a search warrant" for the phone and that he "was asking for [Valdez's] pass code," and that Valdez responded by "refus[ing] to give [Second Detective] the pass code." We acknowledge that, during trial, Second Detective was not directly queried about whether he asked Valdez to provide the government with the swipe code, or whether he merely asked Valdez to input the swipe code himself and hand over the unlocked phone; we also acknowledge that Second Detective did not ***873** specify whether he asked Valdez to provide the swipe code via verbal description or by writing it down on paper. Nevertheless, we think the best reading of the record is that Second Detective asked Valdez to tell him, by word or deed, what the swipe code was. Second Detective stated that he "asked for" the passcode, and that Valdez refused "to give [him] the pass code." We therefore proceed with the understanding that scenario (a), above, applies here: that the government asked

Valdez to provide the swipe code itself, and did not merely ask that Valdez unlock and then hand over his phone.[5]

¶35 By making such a request, Second Detective asked Valdez to make an affirmative verbal statement, whether orally or in writing, that would have unquestionably been testimonial. To put it in Justice Stevens's terms, the government was asking Valdez to provide the equivalent of "the combination to [his] wall safe," a request that asked Valdez to reveal to the government the "contents of his own mind." *See Doe*, 487 U.S. at 210 n.9, 211, 108 S.Ct. 2341 (quotation simplified). This "verbal statement," whether it took oral or written form, would have "convey[ed] information or assert[ed] facts" to the State that it could have used to further its investigation and prosecution of Valdez. *Id.* at 213, 108 S.Ct. 2341 ("The vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the [Fifth Amendment's] privilege."); *see also Davis*, 220 A.3d at 548. Accordingly, the request the State made of Valdez asked for a response that would have been testimonial in nature.

C. The Foregone Conclusion Exception

¶36 The State does not strenuously resist the conclusion that the statement Valdez was asked to make was, at least to some degree, testimonial. Instead, it asserts that, even if the requested statement could be considered to have testimonial aspects, Fifth Amendment protections do not apply; the State contends that

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[5] Because the facts of this case fall within scenario (a), we apply the law to those facts, and express no opinion as to the outcome of a case that might later arise under scenario (b).

the statement Valdez was asked to make had "minimal testimonial significance" because the things the statement would have revealed were "foregone conclusions." Stated another way, the State, citing *Fisher*, 425 U.S. at 410–13, 96 S.Ct. 1569, invokes what it refers to as the "foregone conclusion exception" to testimoniality. In our view, the State misperceives the reach of this exception.

¶37 In *Fisher*, the Supreme Court was not concerned with a verbal communication. *Id.* at 409, 96 S.Ct. 1569 (analyzing the testimoniality of the act of responding to "a documentary summons"). As noted, verbal statements almost always "convey information or assert facts" and are nearly always "testimonial." *See Doe*, 487 U.S. at 213, 108 S.Ct. 2341. But when the communication in question is the act of producing documents or other tangible goods, the question of testimoniality becomes much closer. *See Fisher*, 425 U.S. at 410–13, 96 S.Ct. 1569. As the *Fisher* court noted, even an act of production might have "communicative aspects of its own, wholly aside from the contents of the papers produced," such as, for instance, conceding "the existence of the papers demanded and their possession or control by" the subpoenaed party. *Id.* at 410, 96 S.Ct. 1569.

¶38 But on the facts of *Fisher*, the Court determined that the communicative aspects of the act of production required of the subpoenaed party were too insignificant to warrant Fifth Amendment protection. In reaching that conclusion, the Court noted that, while the party's act of producing the documents would reveal the existence of the documents as well as the fact that copies of them were in the party's custody, those pieces of information were "a foregone conclusion and ... add[ed] little or nothing to the sum total of the

[g]overnment's information." *Id*. at 411, 96 S.Ct. 1569. In *Fisher*, the government already knew exactly which documents it was seeking, and it already knew that the subpoenaed party possessed them. *Id.* at 393–94, 96 S.Ct. 1569. Thus, the party's act of producing the documents would reveal nothing to the government that it did not already know, and therefore the Court held that the party's "Fifth Amendment privilege [was] not violated ***874** because nothing [the party] has said or done is deemed to be sufficiently testimonial." *Id.* at 411, 96 S.Ct. 1569.

¶39 After *Fisher*, the Supreme Court has mentioned the foregone conclusion exception only once more, in *Hubbell*, again in the context of assessing the testimoniality of an act of producing documents. *See* 530 U.S. at 43–45, 120 S.Ct. 2037. This time, the Court found the concept inapplicable, stating that "[w]hatever the scope of this 'foregone conclusion' rationale, the facts of this case plainly fall outside of it," because the government had "not shown that it had any prior knowledge of either the existence or the whereabouts" of the documents it sought. *Id.* at 44–45, 120 S.Ct. 2037.

¶40 Since *Hubbell*, lower courts have taken various approaches in their application of the foregone conclusion exception. Some courts and commentators have been reluctant to expand the scope of the exception, given the Supreme Court's own apparent view that the exception is limited. *See, e.g.*, *Garcia v. State*, 302 So. 3d 1051, 1056–57 (Fla. Dist. Ct. App. 2020), *review granted*, No. SC20-1419, 2020 WL 7230441 (Fla. Dec. 8, 2020); *G.A.Q.L. v. State*, 257 So. 3d 1058, 1065–66 (Fla. Dist. Ct. App. 2018) (Kuntz, J., concurring); *State v. Andrews*, 243 N.J. 447, 234 A.3d 1254, 1287–88 (2020) (LaVecchia, J., dissenting), *petition for cert.*

filed, No. 20-937 (Jan. 7, 2021); *Davis*, 220 A.3d at 548–49; *see also* LaFave, 3 *Criminal Procedure* § 8.13(a) (stating that "requir[ing] the subpoenaed party to reveal a passcode that would allow [the government] to perform the decryption ... would require a testimonial communication standing apart from the act of production, and therefore make unavailable the foregone conclusion doctrine"). These authorities emphasize the fact that, in both *Fisher* and *Hubbell*—the only times the Supreme Court has mentioned the foregone conclusion exception—the Court was analyzing the testimoniality of an act of production of documents, and not the testimoniality of a verbal statement. In *Davis*, for instance, the Pennsylvania Supreme Court described the "foregone conclusion gloss on a Fifth Amendment analysis" as "an extremely limited exception" to Fifth Amendment self-incrimination principles, and noted that the Supreme Court had "never applied or considered the foregone conclusion exception" outside the context of analyzing the testimoniality of the act of producing "business and financial records." *See* 220 A.3d at 549; *see also G.A.Q.L.*, 257 So. 3d at 1066 (Kuntz, J., concurring) (noting that "[t]he foregone conclusion exception has not been applied to oral testimony," and viewing the exception as "inapplicable to the compelled oral testimony sought in this case"); *Andrews*, 234 A.3d at 1287–88 (LaVecchia, J., dissenting) (disagreeing with an approach that would "expansively apply" the foregone conclusion cases "to force disclosure of the contents of one's mind," and instead urging the court to "adhere to the [Supreme] Court's bright line: [that] the contents of one's mind are not available for use by the government in its effort to prosecute an individual"). According to these authorities, the foregone conclusion concept

simply does not apply when assessing the testimoniality of a verbal communication, such as a statement conveying a cell phone passcode to the government.

¶41 Other courts and commentators have taken a different approach, and have proceeded to analyze, on the merits, the applicability of the foregone conclusion exception to situations in which a suspect is forced to disclose the passcode to a cell phone. *See, e.g.*, *Andrews*, 234 A.3d at 1273 (referring to a statement communicating a passcode as "a testimonial act of production," and proceeding to analyze, on the merits, whether the foregone conclusion exception applied to the facts of the case); *Davis*, 220 A.3d at 553–57 (Baer, J., dissenting) (referring to "the compulsion of [the suspect's] password" as "an act of production," and urging the court to conclude that "the foregone conclusion exception may potentially apply to cases involving the compelled disclosure of a computer password"). These authorities appear to recognize that the foregone conclusion exception has been applied by the Supreme Court only in the context of analyzing the testimoniality of acts of production of documents, but they nevertheless conclude that the act of communicating one's passcode to the government falls into the category of an "act of production."

***875** ¶42 We find the more limited approach to be more consistent with governing, binding case law. No Utah appellate court has considered the reach of the foregone conclusion exception. And because the exception is a Fifth Amendment construct, the cases from the United States Supreme Court—the last word as to the meaning and scope of the federal constitution—are binding. That Court, as noted, has not mentioned the foregone conclusion exception in over two decades, when the Court referred to it simply as "this 'foregone

conclusion' rationale," and noted that "whatever [its] scope ..., the facts of this case plainly fall outside of it." *See Hubbell*, 530 U.S. at 44, 120 S.Ct. 2037. The Court has never applied the exception outside of the context of assessing the testimoniality of a nonverbal act of producing documents. *See id.*; *see also Fisher*, 425 U.S. at 411–12, 96 S.Ct. 1569. Yet the Court's instruction regarding the testimoniality of verbal statements, as well as the strongbox key/safe combination illustration, appear to be as robust as ever. *See, e.g.*, *Davis*, 220 A.3d at 547–49 (describing the strongbox key example from *Doe*, and concluding that "prohibition of application of the foregone conclusion rationale to areas of compulsion of one's mental processes" as opposed to acts of production "would be entirely consistent with the Supreme Court decisions, surveyed above, which uniformly protect information arrived at as a result of using one's mind").

¶43 Moreover, given the vintage of the foregone conclusion cases, and the fact that the Supreme Court issued *Fisher* decades before cell phones were in widespread use, we have our doubts about whether the Supreme Court would extend the foregone conclusion concept to verbal statements that convey to the government the passcode to a modern cell phone. Such devices "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Riley v. California*, 573 U.S. 373, 393, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014); *see also United States v. Djibo*, 151 F. Supp. 3d 297, 310 (E.D.N.Y. 2015) (noting that a modern smartphone can contain, in digital form, the "combined footprint of what has been occurring socially, economically, personally, psychologically, spiritually, and sometimes even sexually, in the

owner's life"). And in a pair of recent cases, the Supreme Court has expressed hesitancy in applying analog-era legal rules to our fast-paced cell-phone-centric digital world. *See, e.g.*, *Carpenter v. United States*, —— U.S. ——, 138 S. Ct. 2206, 2222, 201 L.Ed.2d 507 (2018) (noting that when "confronting new concerns wrought by digital technology," the Court "has been careful not to uncritically extend existing precedents," and in that case refusing to extend the "third-party doctrine" to "cell-site location information"); *Riley*, 573 U.S. at 401–02, 134 S.Ct. 2473 (refusing to extend the search-incident-to-arrest exception to the warrant requirement to cell phones found on arrestees); *see also Eunjoo Seo v. State*, 148 N.E.3d 952, 961–62 (Ind. 2020) (determining that the foregone conclusion exception did not apply to the facts of the case, in part because of doubt about whether the Supreme Court, in light of *Carpenter* and *Riley*, would extend the exception to apply to modern cell phones).

¶44 Accordingly, we conclude that the foregone conclusion exception has no potential application here, where Valdez was asked to provide his swipe code to Second Detective, and was not merely asked to turn over an unlocked phone.[6] Valdez's verbal response—

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[6] Even if we were to conclude that the foregone conclusion exception could apply to verbal statements, or that Valdez's statement was an act of production to which the exception could conceivably apply, it would not necessarily follow that the facts of this case fit within the exception's ambit. Courts and commentators are deeply split about which conclusions must be clear and foregone in order for the exception to apply. Some have concluded that the exception applies only if the government can show that it already knew, prior to requesting access to the cell phone, exactly which limited set of documents it was seeking and that

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those documents were to be found on the phone. *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012) (concluding that the foregone conclusion exception did not apply where the government could not show that it knew "whether any files exist and are located on the hard drives"); *People v. Spicer*, 430 Ill.Dec. 268, 125 N.E.3d 1286, 1291 (Ill. App. Ct. 2019) ("We consider that the proper focus is not on the passcode but on the information the passcode protects."); *Eunjoo Seo v. State*, 148 N.E.3d 952, 957–58 (Ind. 2020) (holding that, "unless the State can show it already knows" not only that "the suspect knows the password" but also that "the files on the device exist" and that "the suspect possessed those files," then "the communicative aspects of the production fall within the Fifth Amendment's protection"); Laurent Sacharoff, *What Am I Really Saying When I Open My Smartphone? A Response to Orin S. Kerr*, 97 Tex. L. Rev. Online 63, 68 (2019) (arguing that "[e]ntering the password to open the device is analogous to the physical act of handing over the papers" and that, therefore, "the foregone conclusion doctrine should apply to the files on the device" if the government can "show it already knows they exist and the defendant possesses them"). Others have concluded that, in order to avail itself of the exception, the government need demonstrate only that it already knew that the suspect knows the password. *See, e.g.*, *State v. Andrews*, 243 N.J. 447, 234 A.3d 1254, 1273 (2020) (concluding that "the foregone conclusion test applies to the production of the passcodes themselves, rather than to the phones' contents"), *petition for cert. filed*, No. 20-937 (Jan. 7, 2021); *State v. Pittman*, 367 Or. 498, 526–27, 479 P.3d 1028 (2021) (concluding that "[t]he testimonial information that the act [of production] communicates ... does not include information about the phone's content," and "what the state must demonstrate it already knows" is merely that "the defendant knows the phone's passcode"); Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 Tex. L. Rev. 767, 783 (2018) (opining that "when investigators present a suspect with a password prompt, and they obtain an order compelling the suspect to enter in the correct password, the suspect cannot have a valid Fifth Amendment privilege if the government independently can show that the suspect knows the password"). But because Valdez was asked to provide the actual swipe

whether ***876** oral or written—to Second Detective's request would have been testimonial in nature, in that it would have conveyed to the government information contained in Valdez's mind, namely, the pattern of his swipe code. And as already stated, it is not contested here that the statement may have been at least indirectly incriminating, and that the State implied at trial that Valdez had an obligation to provide the swipe code. Thus, all three prerequisites for Fifth Amendment protection are present here: compulsion, testimoniality, and self-incrimination.

D. The State's Use of the Evidence

¶45 "The mere mention" of a defendant's decision to remain silent, however, does not violate that defendant's constitutional rights. *State v. Saenz*, 2016 UT App 69, ¶ 10, 370 P.3d 1278 (quotation simplified). Instead, what the Fifth Amendment forbids is "either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). That is, in order for Valdez's constitutional rights to have been violated in this instance, the State must have used Valdez's silence to "undermine the exercise of those rights guaranteed" by the Constitution. *See Saenz*, 2016 UT App 69, ¶ 10, 370 P.3d 1278 (quotation simplified). Indeed,

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code and was not merely asked to provide an unlocked phone, and because we have determined that the exception cannot apply to verbal statements seeking the contents of one's mind, we need not—and unlike some other courts, *see Commonwealth v. Davis*, 220 A.3d 534, 550 n.9 (Pa. 2019), *cert. denied*, —— U.S. ——, 141 S. Ct. 237, 208 L.Ed.2d 17 (2020), we elect not to—take a position on the further applicability of the exception to the facts of this case.

as we have previously recognized, "the evil to be avoided in this context" is not the mere mention of a defendant's invocation of the right to remain silent but, rather, "the implication that such silence is evidence of guilt." *Id.* (quotation simplified). The trial court did not discuss this next analytical step; indeed, its decision to allow Second Detective to testify about Valdez's refusal to provide the passcode appears to have been based on a belief that such refusal is not protected by the Fifth Amendment at all. If a statement (or refusal to make a statement) does not enjoy Fifth Amendment protection, the prosecution can use the statement or refusal to imply guilt without offending the Fifth Amendment, and in such cases the court need not in this context analyze the uses to which the prosecution puts such evidence. However, because we have determined that Valdez's refusal to provide the passcode does enjoy Fifth Amendment protection, we must proceed to assess whether the State used that evidence to imply Valdez's guilt.

¶46 Here, the State did more than merely mention Valdez's refusal to provide the swipe code. One of Valdez's main defenses was his claim—supported by Ex-Wife's trial testimony—that ***877** his encounter with Ex-Girlfriend had been friendly rather than adversarial, and had been preceded by a sexually charged text message exchange discussing reconciliation. During its closing argument, the State attempted to rebut this defense by pointing out that no such text messages were in evidence, and by urging the jury to disbelieve Ex-Wife's account of the text messages she claimed to have seen. In so doing, the State described the "efforts that were taken to get into [Valdez's] phone to determine what, if any, communication happened between" him and Ex-Girlfriend, and noted that Valdez had

been given an opportunity to allow officers to access his cell phone—on which such messages could presumably be found—and that he "chose to decline to" provide the passcode.[7]

¶47 In its closing narrative, the State quite clearly invited the jury to draw an inference of guilt from Valdez's silence. And even "[i]ndirect references to a defendant's failure to testify are constitutionally impermissible if the comments were manifestly intended to be or were of such a character that the jury would naturally and necessarily construe them to be a comment on the defendant's failure to testify." *State v. Tillman*, 750 P.2d 546, 554 (Utah 1987). In this vein, the Utah Supreme Court has declared that "a prosecutor commits constitutional error" by making a statement that is "of such character that a jury would naturally and necessarily construe it to amount to a comment on the failure of the accused" to speak. *State v. Nelson-Waggoner*, 2004 UT 29, ¶ 31, 94 P.3d 186 (quotation simplified).

¶48 In sum, Valdez had a Fifth Amendment right to refuse to provide the swipe code to investigating officers, and during trial the State invited the jury to draw

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[7] At oral argument, the State asserted that, even if it was not permitted to comment on Valdez's silence, it was permitted to emphasize Valdez's additional statement that officers should "destroy the phone." On the record before us, we disagree. As an initial matter, Valdez's statement about destroying the phone was made in connection with stating his refusal to provide the passcode, and therefore commentary about Valdez's statement about destroying the phone would have necessarily implicated Valdez's exercise of his right to silence. And in any event, the State in closing argument did not emphasize Valdez's statement about destroying the phone; instead, it emphasized Valdez's choice to decline to provide officers the passcode.

an inference of guilt from Valdez's silence. This action was no "mere mention" of Valdez's decision to withhold the swipe code. *See Saenz*, 2016 UT App 69, ¶ 10, 370 P.3d 1278 (quotation simplified). In this context, the State's evidentiary use of Valdez's refusal to provide the swipe code violated Valdez's rights under the Fifth Amendment, and the trial court erred by allowing such evidence to come in and by allowing the State to use it in this manner.

E. Harmless Error

¶49 But not "all federal constitutional errors, regardless of their nature or the circumstances of the case, require reversal of a judgment of conviction." *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). And "in the context of a particular case, certain constitutional errors, no less than other errors, may have been 'harmless.' " *Id.* However, when the error in question is "constitutional in nature, ... its harmlessness is to be judged by a higher standard." *See State v. Villarreal*, 889 P.2d 419, 425 (Utah 1995) (quotation simplified). Under that higher standard, "reversal is required unless the error is harmless beyond a reasonable doubt," *State v. Drommond*, 2020 UT 50, ¶ 105, 469 P.3d 1056 (quotation simplified), and—at least for preserved claims of constitutional error—"the burden to demonstrate harm [or lack thereof] ... shifts from the defendant to the State when a constitutional error is alleged," *see State v. Bond*, 2015 UT 88, ¶ 37, 361 P.3d 104; *see also Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (stating that "constitutional error ... casts on someone other than the person prejudiced by it a burden to show that it was harmless").

¶50 Under this harmless error standard, we must attempt to "determine the probable impact of the testimony on the minds of the average juror." *Drommond*, 2020 UT 50, ¶ 105, 469 P.3d 1056 (quotation simplified). In undertaking this inquiry, we ***878** "evaluate several factors," including "the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence collaborating or contradicting the testimony of the witness on material points, the extent of cross-examination permitted, and, of course, the overall strength of the prosecution's case." *Id.* (quotation simplified). If we "may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt," then the conviction will be affirmed despite the error. *See State v. Maestas*, 2012 UT 46, ¶ 56, 299 P.3d 892 (quotation simplified). On the other hand, "we cannot declare federal constitutional error harmless unless we sincerely believe that it was harmless beyond a reasonable doubt." *See State v. Genovesi*, 909 P.2d 916, 922 (Utah Ct. App. 1995) (quotation simplified); *see also Drommond*, 2020 UT 50, ¶ 105, 469 P.3d 1056 (stating that "reversal is required unless the error is harmless beyond a reasonable doubt" (quotation simplified)).

¶51 Under the circumstances presented here, the State has not carried its burden of demonstrating that its improper use of evidence that Valdez refused to provide his swipe code was harmless beyond a reasonable doubt. Valdez's chief defense to the charges was that the entire encounter with Ex-Girlfriend had not been a kidnapping or an assault, but instead had been voluntary on her part, and even a mutual effort toward reconciliation. And Ex-Wife's testimony describing sexually charged text messages between Ex-

Girlfriend and Valdez on the morning of the incident was an important part of Valdez's defense. Indeed, the State recognized the importance of Ex-Wife's testimony by discussing it—and attempting to rebut it—during closing argument by arguing that Valdez's refusal to provide the swipe code indicated that no such text messages existed. *See State v. Ellis*, 2018 UT 2, ¶ 43, 417 P.3d 86*State v. Ellis*, 2018 UT 2, ¶ 43, 417 P.3d 86 (stating that one factor leading to the conclusion that the admission of the evidence was not harmless was that "[t]he prosecution emphasized [it] during closing argument").

¶52 And while the prosecution's case was certainly supported by some persuasive evidence, we do not consider its case to have been so overwhelming as to render the error harmless beyond a reasonable doubt. Ex-Girlfriend's testimony was corroborated, in part, by Witness's account, especially Witness's perception that Valdez had been attempting to prevent Ex-Girlfriend from leaving the vehicle. But other portions of Ex-Girlfriend's testimony were unsupported by other evidence. Indeed, the physical evidence pointed to a more minor altercation than the one Ex-Girlfriend reported. Ex-Girlfriend had a broken hair clip and a small cut on her lip, but no other signs of injury. Additionally, officers never found Ex-Girlfriend's phone, an actual handgun, or any knife, and Witness did not see a knife or a gun or any assault in her observations of the incident.

¶53 Given the total evidentiary picture presented here, we have reasonable doubt about whether the improperly admitted evidence made a difference in the outcome of this case. Accordingly, the State has not carried its burden of demonstrating that the error was harmless beyond a reasonable doubt. On this basis, we

reverse Valdez's conviction and remand for further proceedings, including potentially a new trial.

II.

¶54 Valdez also raises a number of additional claims on appeal. First, he argues that his attorney rendered ineffective assistance of counsel in several respects, including the following: by failing to object to Second Detective's testimony opining on the veracity of Ex-Girlfriend's statements, and by failing to object to the length and detail of First Detective's narrative of the incident. Second, Valdez asserts that the trial court erred when it excluded Aunt's testimony. Because we reverse and remand for a new trial solely on the basis of the Fifth Amendment violation discussed above, we need not reach a decision on the merits of Valdez's other arguments. But we are troubled by certain aspects of how the trial proceeded and, in an effort to offer guidance that might be useful on remand, where these issues are likely to arise again, we briefly discuss some of Valdez's other arguments. *See, e.g.*, *State v. Low*, 2008 UT 58, ¶ 61, 192 P.3d 867 (although reversing on another ground and remanding ***879** for new trial, nevertheless proceeding to comment on "other issues presented on appeal that will likely arise during retrial").

¶55 The testimony the State elicited from Second Detective regarding his opinion of the veracity of Ex-Girlfriend's statements was improper and inadmissible "vouching" testimony, and the trial court was correct to step in, of its own accord, and strike that testimony. Our law "prohibits any testimony as to a witness's truthfulness on a particular occasion." *See State v. Rimmasch*, 775 P.2d 388, 391 (Utah 1989), *superseded in part by rule as stated in State v. Maestas*, 2012 UT

46, ¶ 121 n.134, 299 P.3d 892. And in our view, these principles would have applied not only to Second Detective's testimony that he believed Ex-Girlfriend was telling the truth, but also to his claims regarding his status as a sort of human lie detector, including his description of the techniques he employed in his efforts to ferret out lies. While we stop short of making any determination that Valdez's counsel rendered ineffective assistance[8] in not objecting to Second Detective's testimony in this regard, we note the impropriety of that testimony.

¶56 In addition, we are concerned about the State's—and the trial court's—conception of the scope of the so-called "police investigation exception" to the usual ban on hearsay testimony. In *State v. Collier*, 736 P.2d 231 (Utah 1987), our supreme court held that a police officer was allowed to testify that a confidential informant had told him, prior to a raid on a house, that an occupant was "armed and would not be taken alive." *Id.* at 233 (quotation simplified). The court held that this brief testimony, though consisting of another declarant's out-of-court statement that might otherwise be considered hearsay, was admissible because it "was not admitted to prove the truth of the information"—that the occupant of the house was in fact armed and refused to be taken alive—but "rather to explain the conduct of the police in setting up an armed stakeout

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[8] To establish ineffective assistance of counsel, Valdez would have to show that his attorney's representation "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

of the [house]." *Id.* at 234. Other jurisdictions have likewise recognized that limited statements made by other declarants, and offered by testifying police officers, that serve to explain why police acted in a particular way may constitute admissible non-hearsay because the statements are not offered for the truth of the matter asserted. *See, e.g.*, *Jones v. Basinger*, 635 F.3d 1030, 1044–45 (7th Cir. 2011) (stating that "an informant's out-of-court statement to law enforcement is not hearsay if that statement is offered into evidence as an explanation of why the subsequent investigation proceeded as it did" (quotation simplified)). But courts and commentators have noted that this hearsay "exception" carries the potential for abuse. *See, e.g.*, *id.* at 1046 (stating that "statements offered to show 'background' or 'the course of the investigation' can easily violate a core constitutional right, are easily misused, and are usually no more than minimally relevant," and urging courts "asked to admit such statements for supposed non-hearsay purposes" to be "on the alert for such misuse"); *United States v. Cass*, 127 F.3d 1218, 1222–23 (10th Cir. 1997) (noting that the *McCormick on Evidence* treatise has "criticized the 'apparently widespread abuse' of [the police investigation exception]," and stating that proper use of the exception "involve[s] the admission of, at most, only a few limited statements" and not "scores of out-of-court statements"). While we do not purport to here set forth the precise parameters of the police investigation exception in Utah, or to decide whether Valdez's counsel performed deficiently under these circumstances by lodging a tardy objection to First Detective's testimony, it is our view that the entirety of First Detective's lengthy narrative testimony about

what Ex-Girlfriend told him was not admissible under that exception.

¶57 Finally, we make brief mention of Valdez's assertion that Aunt should have been allowed to testify. On appeal—but not before the trial court—Valdez argues, citing *State v. Thompson*, 2014 UT App 14, ¶ 29, 318 P.3d 1221 (stating that rule 608(b) does not bar ***880** "evidence used to directly rebut a witness's testimony or other evidence"), that Aunt's testimony should have been allowed as ordinary impeachment evidence, admissible to rebut Ex-Girlfriend's claim that she had largely attempted to avoid Valdez following their breakup. However, Valdez failed to make that argument before the trial court, arguing only that Aunt's testimony was admissible pursuant to rule 608(c). Both because this claim is unpreserved, and because we need not reach its merits in any event, we do not opine as to the ultimate admissibility of Aunt's testimony. But the argument is one that should be addressed on remand, should Valdez renew it there.

CONCLUSION

¶58 Valdez's Fifth Amendment rights were violated when the trial court allowed Second Detective to testify about Valdez's refusal to provide the State his cell phone passcode, and the State argued, in turn, that the jury should infer from Valdez's refusal that no reconciliatory texts between Valdez and Ex-Girlfriend existed. Because the State impermissibly invited the jury to interpret Valdez's silence as an inference of his guilt, and because this error was not harmless beyond a reasonable doubt, we reverse and remand for further proceedings in accordance with this opinion.

All Citations

482 P.3d 861, 2021 UT App 13

APPENDIX C

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

Case No. 171901990

STATE OF UTAH, PLAINTIFF

vs.

ALFONSO MARGO VALDEZ, DEFENDANT

REPORTER'S TRANSCRIPT

JURY TRIAL

OCTOBER 19, 2018

BEFORE THE HONORABLE JOSEPH BEAN
SECOND DISTRICT COURT
WEBER COUNTY COURTHOUSE
OGDEN, UTAH

Transcribed by: RUSSEL D. MORGAN

APPEARANCES

For the Plaintiff:

MICHELLE A. JEFFS
RACHEL M. SNOW
Weber County Attorney's Office

For the Defendant:

SHAWN C. CONDIE
Attorney at Law

* * *

[375]

Q Small.

A So, we have the 30th. This is the date right here. This is the time. These are the seconds, the duration of the call. Whether they are outgoing or incoming. And the phone number that is making the phone call and the phone call that it is calling right there.

Q Thank you, Detective Haney. Does the sheriff's office have the ability to search the data on a phone?

A Yes.

Q Who performs the search?

A Detective Cameron Hartman.

Q And we heard from Detective Hartman earlier in this trial, correct?

A Yes.

Q Was the phone that you seized from the defendant's pocket searched?

A No. We were unable to gain access to the data inside the phone.

Q And are you familiar with why you were unable to access the data?

A Yes.

Q Why is that?

A We needed a pass code to get inside the phone, a security pass code. And also --

MR. CONDIE: Your Honor, can we approach, Your [376] Honor?

THE COURT: Yes.

(Whereupon a bench conference was held on the record.)

MR. CONDIE: I don't know where he's going but I know that the state has tried to obtain his pass code from him. And he's refused to do so. I think that's a Fifth Amendment Right he has to not provide information. I think that they can testify that they tried to get the pass code, they couldn't get the pass code, they tried but couldn't.

(Inaudible) testimony that they asked the defendant (Inaudible.)

MS. SNOW: A warrant was obtained for the pass code. Detective Haney served the warrant on the defendant. And he refused to give the pass code. The jury has a right to know why the officers were unable to access the phone when there could have been evidence very pertinent to the case.

THE COURT: I'm going to overrule the objection for this reason. There are a lot of times when people refuse to answer questions and the officer has the right to say this person invoked their Fifth Amendment Right or this person asked for an attorney. And instead of answering the questions. It happens. We get that all the time. I don't think that's a an unusual scenario of circumstance.

MR. CONDIE: Whether or not they think it's a [377] violation of his rights.

THE COURT: I understand.

MR. CONDIE: I just need to make a record.

THE COURT: Court will overrule the objection.

BY MS. SNOW:

Q Detective Haney, you were explaining why you were unable to access the phone?

A We didn't have the pass code to get into the phone. It was a swipe pattern. And we did not have that pattern.

Q Did you obtain a warrant to search the phone?

A Yes, I did.

Q Did you speak with the defendant about the pass code?

A Yes, I did.

Q And what did he say when you spoke with him?

A Well, I explained to him that I had a search-warrant and that I was asking for his pass code, otherwise we were going to have to attempt to chip off, maneuver that you send down to the lab at Dixie laboratories. And it destroys the phone.

Q And how did he respond?

A He refused to give me the pass code and just told me to destroy the phone.

Q And were you able to access the phone at any [378] point?

A No.

Q Thank you. I have no further questions at this time.

THE COURT: Mr. Condie, cross-examination?

MR. CONDIE: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. CONDIE:

Q Detective Haney, we've got some things to cover. I'll try to be brief and concise and move around. You testified about quite a bit in your direct with the state. I would like to go back to your interview with Miss Burcham. During your interview with Miss Burcham, when asked by the state if she appeared to be consistent with everything that you had known about the case prior to and afterwards, and did you answer yes she was?

A Yes.

Q Did you find anything about her, in her interview that was inconsistent with what you or other officers uncovered through your investigation in the case?

A No.

Q Did she provide you with any information at all whether you found it ultimately relevant or not that you found to be factually inaccurate?

A No.

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[479]

THE COURT: All right. Thank you. Court will be in recess.

MS. SNOW: When would you like us back?

(Whereupon, a lunch recess was taken.)

THE COURT: We are back on the record in the case of State of Utah vs. Alfonso Margo Valdez. Case number 171901990. Afternoon. Looks like everyone is here. We have all counsel present. Mr. Valdez is

present. Mr. Condie, you are standing so, I take it, that you have something to say. Go ahead.

MR. CONDIE: It's hard to sit today, Your Honor. I would like to make a, while we are on the record without a jury, make a motion. We don't need to argue forever on it. But I do think it's important to preserve the record as best I can. And I have been able to confer some things over lunch and I would like at this time to make a motion for mistrial, Your Honor, based off of testimony from Detective Haney that he interviewed my client and gave him his Miranda rights and to which Mr. Valdez invoked them. And I anticipate the state arguing that this is meant to show a thorough investigation and to show that, to show that Detective Haney has done everything that he can. And I do think that was the intent, likely, however, I do think that my client has a right not to speak to officers, to have that right to invoke his right to counsel and offering that [480] without, with him not testifying doesn't give him a chance to explain the situation or explain the circumstances. So, therefore, Your Honor, it's the defense's motion that the court grant a mistrial because of the state's questioning of Detective Haney to that end.

THE COURT: All right. Thank you. I don't think I need to hear from the State. I am going to deny that motion. And I will however entertain a possible instruction if you want to the propose a jury instruction to that end. I think the jury instructions to some extent already touch on that. You are certainly welcome to touch on in closing arguments. This is a jury instruction saying that the defendant doesn't have to testify. He doesn't have to prove anything. You heard Detective Haney say that he gave him Miranda and he chose not to. Simply exercising your Fifth Amendment

Right is not something you should consider as a jury in reaching your verdict. And I think that's perfectly acceptable for you to talk to them about that if you feel that a corrective instruction would help out better in that way, I'll certainly consider that corrective instruction.

MR. CONDIE: Thank you, Your Honor.

THE COURT: But the motion for mistrial I am going to deny.

MR. CONDIE: I understand and just for the record I would also like to amend my motion to include not only the [481] statement of invoking his Miranda rights but also any statement of him failing to comply with their request to provide the code for the phone. I think that those are both applicable under the same constitutional protections. So --

THE COURT: I'll hear from the state on that one if you want to address that one.

MS. SNOW: The state would object to that motion. The testimony from Detective Haney was proffered. Along a similar vain that the jury is entitled to know about the thoroughness of the investigation and how that occurred. It's proper for an officer to be able to one, say the defendant chose not to give a statement. Along those same lines, this evidence is a analogous to that where he chose not to give a pass code. The jury is entitled to know why the officers were not able to get in the phone. And the efforts that they took to conduct a thorough investigation, especially where that has become an issue that the defense intends to raise. The state's entitled to rebut that with the available evidence.

THE COURT: I don't want to get too far into some of the esoteric things I tend to do sometimes. But it seems to me that there's a fine line between a statement, first of all, and a pass code. Statement is a verbal, generally a verbal something. And Miranda does protect someone from giving a statement. But Miranda does not necessarily, and [482] the Fifth Amendment does not necessarily protect someone from, it's a fine line, from almost obstructing an investigation by refusing to cooperate with police. And I'm not really sure what giving a pass code on a phone where that comes in. The Fifth Amendment I don't think is necessarily restricted to statements in the broad sense. But at the same time, there is an obstruction of justice issue as well. To what extent you allow someone to obstruct an investigation, that's non-statement kind of thing. So it's not a statement. But to what extent you allow someone to obstruct investigation over something like that. And frankly, I don't know the answer, counsel. I know what I am inclined to do and say that's different than a statement, giving a pass code to a phone.

MR. CONDIE: If I could make a --

THE COURT: Is it just elaborating on what I just said?

MR. CONDIE: Yes. All I wanted to add just for the record, Your Honor, is the defense's position is that providing the statement is testimonial in nature. And the purpose to provide it would be to get the contents of the phone, which would be incriminating. And he does have that right to not incriminate himself.

THE COURT: It's giving evidence against yourself.

MR. CONDIE: Essentially.

[483] THE COURT: Yeah, which is a little bit different. And that's why I said in a broader sense the Fifth Amendment does give some protection to that. But Miss Snow you are standing. Go ahead.

MS. SNOW: I have nothing further. I am just waiting for the court to rule unless there is a question.

THE COURT: Let me give it some thought and we'll talk about it when we do the jury instructions.

MR. CONDIE: That's fine. We don't need to hold the day up. That's not the intent.

THE COURT: All right. Anything further?

MR. CONDIE: No, Your Honor.

MS. SNOW: Nothing from the state.

THE COURT: Thank you. Anything further?

MR. CONDIE: No, Your Honor.

THE COURT: Would you give me a road map of where you are headed?

MR. CONDIE: Our intention now is to call Miss Prudence Valdez. Then I think after that, our intuition already is to call Miss Shiane Valdez. And then Chris Zeigler. And we'll take it to that point.

THE COURT: All right. Thank you.

MR. CONDIE: And these should be fairly quick, Your Honor.

THE COURT: Okay. Thank you. Deputy Neil, [484] let's go ahead and bring in the jury.

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