

APPENDIX
TABLE OF CONTENTS

	Page
Appendix A — Illinois Supreme Court Opinion	1a
Appendix B — Appellate Court Opinion	59a
Appendix C — Trial Court Order	88a
Appendix D — Search Warrant Complaint and Search Warrant	98a
Appendix E — State’s Motion to Compel Production of Cellular Phone Passcode	101a
Appendix F — Defendant’s Response to State’s Motion to Compel Production of Cellular Phone Passcode	109a

2023 IL 127968

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

(Docket No. 127968)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v.
KEIRON K. SNEED, Appellant.

Opinion filed June 15, 2023.

JUSTICE OVERSTREET delivered the judgment of the court, with opinion.

Chief Justice Theis and Justices Holder White, Cunningham, and Rochford concurred in the judgment and opinion.

Justice Neville dissented, with opinion.

Justice O'Brien took no part in the decision.

OPINION

¶ 1 Defendant, Keiron K. Sneed, was charged in the circuit court of De Witt County with two counts of forgery (720 ILCS 5/17-3(a)(1) (West 2020)). The charges

stemmed from the discovery of two false paychecks that were payable to defendant, endorsed by him, and cashed and/or deposited via mobile deposit. Police procured a search warrant for defendant's cell phone but were unable to execute the warrant because the cell phone was passcode protected and defendant refused to provide the passcode. Accordingly, the State filed a motion to compel production of the cell phone's passcode.

¶ 2 The circuit court found the fifth amendment privilege against self-incrimination prevented the State from compelling defendant to provide the passcode, as doing so would constitute compelling incriminating testimonial communication. See U.S. Const., amend. V. The circuit court further concluded that the foregone conclusion doctrine did not apply as an exception to bypass the fifth amendment privilege. Therefore, the circuit court denied the State's motion to compel production.¹ The State filed a certificate of substantial impairment, and the matter proceeded to the appellate court.

¶ 3 After determining that it had jurisdiction over the appeal pursuant to Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2017) (2021 IL App (4th) 210180, ¶ 30), the appellate court concluded that the act of producing a cell phone's passcode is not an incriminating, testimonial communication under the fifth amendment and is therefore not privileged (*id.* ¶ 63). It further concluded that the foregone conclusion doctrine applied,² rendering the act of producing the passcode outside the scope of fifth amendment protection. *Id.* ¶ 102. The appellate court reversed the circuit court's order and remanded for further proceedings. *Id.* ¶ 108. We now affirm the judgment of the appellate court, albeit on different grounds.

¶ 4

I. BACKGROUND

¶ 5 On February 8, 2021, defendant was charged by information with two counts of forgery (720 ILCS 5/17-3(a)(1) (West 2020)). The information alleged that

¹The circuit court issued its ruling orally at the conclusion of the hearing on the motion to compel, and a docket entry reflects that the circuit court denied the motion. The record does not include a written order.

²Finding the compelled act of producing the passcode was nontestimonial rendered a foregone conclusion analysis unnecessary. Yet the appellate court considered the issue, asserting its conclusion that the doctrine applied as "a second and separate reason" that the circuit court erred in denying the State's motion to compel.

defendant created two false paychecks from Dairy Queen with the intent to defraud Dairy Queen and financial institutions. Defendant and his wife, Allora Spurling Sneed (Spurling), were both arrested in connection with the false paychecks. Upon their arrest, officers seized two cell phones—one from defendant and one from Spurling.

¶ 6

A. Search Warrant

¶ 7

On March 1, 2021, Detective Todd Ummel of the Clinton Police Department applied for a search warrant to search the content of both phones. The complaint for search warrant provided as follows. On January 5, 2021, Sara Schlesinger—a bookkeeper for Dairy Queen in Clinton, Illinois—reported that she discovered a paycheck in the amount of \$274.33, payable to defendant. Spurling was an employee of Dairy Queen at the time, but defendant was not. The paycheck had been cashed via Citibank mobile deposit. Schlesinger provided text messages between herself and Spurling, in which Spurling acknowledged a forged paycheck but claimed that “it wasn’t meant to happen for real. It [sic] was being curious and he didn’t think it would actually work cuz [sic] it wasn’t real. *** But please know I had no clue about it[.]” Schlesinger confirmed that funds in the amount of the paycheck were deducted from Dairy Queen’s account at State Bank of Lincoln.

¶ 8

The complaint for search warrant further provided that Ummel attempted to interview Spurling, who agreed to meet him on January 7, 2021. However, Spurling did not attend the meeting, claiming she had been exposed to COVID-19. The meeting was rescheduled, but Spurling did not attend, and additional attempts to contact her were unsuccessful.

¶ 9

On February 8, 2021, Schlesinger provided police an additional forged paycheck payable to defendant in the amount of \$423.22, which was also deducted from Dairy Queen’s account via mobile deposit. According to the endorsement on the back of the check, the amount was to be deposited to Varo Bank.

¶ 10

Ummel’s complaint for search warrant sought the following:

“Any and all evidence related to the forging and transmission of paychecks drawn upon the State Bank of Lincoln from the account of Dairy Queen ***, as well as any other forged checks to include:

Photographs and records of paychecks from Dairy Queen

Records of messages sent from the phones of [defendant] and [Spurling] pertaining to the forged paychecks from text messaging applications or other messaging applications such as Facebook, WhatsApp, etc.

Confirmations of deposits from [Citibank], Varo Bank, and any other banks

Emails, messages, and application notifications pertaining to the deposit of checks.”

¶ 11 On March 1, 2021, the circuit court issued a search warrant granting officers permission to search both phones.³

¶ 12 B. State’s Motion to Compel

¶ 13 On March 5, 2021, the State filed a motion to compel production of the passcode to defendant’s cell phone. The motion alleged that officers were unable to execute the search warrant because defendant’s phone was passcode protected. As such, the State requested the circuit court to compel defendant to either provide the passcode or to enter the passcode into his phone. On March 23, 2021, the circuit court conducted a hearing on the motion to compel. At the hearing, Detective Ummel testified that Schlesinger contacted the Clinton Police Department on January 5, 2021, reporting that defendant had cashed fraudulent checks on Dairy Queen’s account via mobile deposit from a cell phone. Ummel explained that a mobile deposit consists of photographing a check and submitting it electronically to a financial institution for deposit.

³Though both phones were seized and the search warrant issued for both, this appeal pertains only to defendant’s phone. As such, we limit the balance of our discussion to defendant’s phone.

¶ 14 Ummel indicated that he had reviewed photographs of the checks, both of which were payable to and endorsed by defendant.⁴ Ummel testified that Spurling admitted via text message that defendant cashed the checks but “[i]t was only a joke, she said,” because defendant did not believe the counterfeit checks would successfully deposit. Ummel confirmed that defendant was not a Dairy Queen employee but that Spurling had been and was terminated after the subject events transpired. Ummel indicated that Dairy Queen’s bank statements reflected that funds in the amounts of the checks had been deducted from Dairy Queen’s account.

¶ 15 Ummel believed defendant’s phone contained a photograph of the checks, and he was “hoping to find” such a photograph. Ummel further sought additional files pertaining to the mobile deposits. He conceded, however, that he did not know for certain that any such files existed and that there was currently nothing connecting defendant to the transactions besides Spurling’s statements. Ummel added that he had not attempted to subpoena records from defendant’s cell phone carrier to obtain copies of text messages.

¶ 16 Ummel testified that officers were unable to execute the search warrant because defendant’s phone was passcode protected and defendant refused to provide the passcode. Ummel explained that he was exercising caution, as he knew that too many failed attempts to open a cell phone with the incorrect passcode will permanently lock the phone. Ummel indicated that Clinton Police Department did not have “cell phone cracking” technology and that Illinois State Police would not assist in doing so unless the case involved narcotics. Ummel testified that defendant completed a bond form after his arrest and provided a phone number that matched the seized phone.

¶ 17 C. Circuit Court’s Judgment

¶ 18 The circuit court observed that the fifth amendment applies when the accused is compelled to make an incriminating, testimonial communication. See *Hiibel v. District Court of Nevada*, 542 U.S. 177, 189 (2004). It further observed that an act of production is testimonial for fifth amendment purposes when the accused is

⁴The record is devoid of further information about these photographs or any additional details regarding Ummel viewing them.

compelled to make extensive use of his own mind to communicate a statement of fact. See *United States v. Hubbell*, 530 U.S. 27, 43 (2000). The circuit court stressed that the testimonial nature of compelling the production of the passcode was diminished in this case because the phone was found on defendant's person and the bond sheet reflected that defendant identified the phone number associated with the phone as his phone number. The circuit court indicated that, under these facts, defendant's knowledge of the passcode did not provide any further evidence against him than that which already existed and that producing the passcode would not seemingly make extensive use of the contents of defendant's mind. The circuit court opined that disclosing the passcode was "no different than compelling a [d]efendant to disclose a key to a storage unit or a lockbox or something of that nature."

¶ 19 The circuit court asserted that "an objective, reasonable judge could reach the conclusion that the production of the [passcode] is not testimonial." However, it emphasized that it was obligated to follow the precedent established by the Appellate Court, Third District, in *People v. Spicer*, 2019 IL App (3d) 170814, which made clear that the compelled production of a cell phone passcode is testimonial and thus privileged under the fifth amendment, and for purposes of the foregone conclusion exception (see *Fisher v. United States*, 425 U.S. 391, 411 (1976)), the proper focus is not on the passcode but on the information protected by the passcode.

¶ 20 Applying those principles, the circuit court observed that Spurling's statements were the only evidence linking defendant's phone to the transactions in question and it would be speculative to presume that a photograph of the checks would remain on the phone after the transactions were complete. Though the circuit court did not perceive the State's endeavor as a fishing expedition, it concluded that the State did not establish with reasonable particularity that, at the time it sought the act of production, it knew the evidence existed, the evidence was in defendant's possession, and the evidence was authentic. See *Hubbell*, 530 U.S. at 40-41. On that basis, the circuit court concluded that the foregone conclusion doctrine did not apply as an exception to bypass the protections of the fifth amendment and denied the State's motion to compel. The State filed a certificate of substantial impairment, and the matter proceeded to the appellate court.

¶ 21

D. Appellate Court's Judgment

¶ 22

The Appellate Court, Fourth District, accepted the State's good-faith evaluation in its certificate of substantial impairment, which indicated that the circuit court's order substantially impaired its ability to prosecute the case. 2021 IL App (4th) 210180, ¶¶ 33-34. The appellate court agreed that the order was "like an order suppressing evidence" and concluded it had jurisdiction to consider the appeal under Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2017). 2021 IL App (4th) 210180, ¶ 34.

¶ 23

In considering the merits, the appellate court recognized that the circuit court concluded as it did because it was bound by *Spicer*, which was the only Illinois precedent on the issue. *Id.* ¶ 62. In *Spicer*, a cell phone was found on the defendant's person when he was searched incident to arrest. 2019 IL App (3d) 170814, ¶ 4. Officers procured a search warrant for the phone. *Id.* The phone was passcode protected, and because the defendant refused to provide the passcode, the State filed a motion to compel the defendant to produce the passcode. *Id.* The circuit court denied the motion to compel, finding the State's request implicated defendant's fifth amendment right against self-incrimination. *Id.* ¶ 7. The circuit court further found the foregone conclusion exception did not apply because the State did not know what evidence was on the phone but had merely indicated the phone "probably" contained incriminating evidence. *Id.*

¶ 24

At the time of the *Spicer* litigation, there was no Illinois precedent on the issue. *Id.* ¶ 16. Accordingly, the *Spicer* court observed *G.A.Q.L. v. State*, 257 So. 3d 1058, 1060 (Fla. Dist. Ct. App. 2018), in which the State of Florida moved to compel the defendant to provide passcodes to his phone and iTunes account. The circuit court granted the motions to compel. *Id.* The reviewing court in *G.A.Q.L.* found that compelling the production of the passcodes resulted in "implied factual statements" and necessitated using the mind, not to "obtain[] the decryption for its own sake, but for the purpose of obtaining the files protected by the encryption." *Id.* at 1062 (quoting *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012)). Finding the State did not seek the passcodes but information on the phone, the reviewing court determined that the defendant was compelled to use his mind and demonstrate the fact that he could access his phone. *Id.* On that basis, the reviewing court concluded that compelling

the defendant to reveal the passcodes was testimonial for fifth amendment purposes. *Id.* at 1062-63.

¶ 25 After determining that the act of producing the passcodes was testimonial, the *G.A.Q.L.* court examined the foregone conclusion doctrine. *Id.* at 1063. In doing so, the court focused on the contents of the phone rather than the passcode and concluded that the foregone conclusion exception did not apply because the State failed to show that it knew with reasonable particularity the existence of the contents of the phone. *Id.* at 1064-65. The court indicated it was insufficient to merely infer that any evidence existed but, rather, the State must identify with reasonable particularity what evidence existed beyond the passcode wall. *Id.* at 1064.

¶ 26 The *Spicer* court adopted the analysis and conclusion of *G.A.Q.L.*, asserting that likewise, in its case, the State was not pursuing the passcode itself but information beyond the passcode wall. *Spicer*, 2019 IL App (3d) 170814, ¶ 21. The *Spicer* court noted contrary decisions finding the foregone conclusion exception applicable because the focus in those cases was on the passcode. *Id.* Conversely, the *Spicer* court concluded that the proper focus is on the information the passcode protects rather than on the passcode itself. *Id.* Applied to its case, the *Spicer* court indicated that the State was required to show the information on the phone with reasonable particularity but that it failed to do so. *Id.* Thus, the *Spicer* court concluded that the foregone conclusion exception did not apply to bypass the protections of the fifth amendment. *Id.* ¶ 22.

¶ 27 In this case, the appellate court declined to follow *Spicer* and concluded that the compelled production of the passcode is nontestimonial, reasoning that a passcode may be used so often that retrieving it “is a function of muscle memory rather than an exercise of conscious thought.” 2021 IL App (4th) 210180, ¶ 59. The appellate court asserted that “a cell phone passcode is more akin to a key to a strongbox than a combination to a safe.” *Id.* ¶ 60. See *Doe v. United States*, 487 U.S. 201, 210 n.9 (1988) (compelling the execution of an authorization is more like surrendering a key than revealing a combination to a safe); *cf. Hubbell*, 530 U.S. at 43 (compiling hundreds of documents analogous to revealing the combination to a wall safe rather than surrendering a key to a strongbox).

¶ 28 The appellate court further observed *United States v. Oloyede*, 933 F.3d 302, 309 (4th Cir. 2019), which suggested that unlocking a phone may not be testimonial if (1) it is settled the defendant owns the phone, (2) the defendant is not requested to reveal the passcode to officers, and (3) the defendant makes the contents of the phone accessible to officers by entering the passcode without revealing it. 2021 IL App (4th) 210180, ¶ 61. Applying *Oloyede* here, the appellate court observed the State requested an order for defendant to “provide entry” to his phone, meaning that defendant—like the *Oloyede* defendant—could enter the passcode and make its contents accessible without revealing it to officers. *Id.* For these reasons, the appellate court concluded that compelling defendant to produce the passcode was nontestimonial for purposes of the fifth amendment. *Id.* ¶ 63.

¶ 29 Though the appellate court found the act of producing the passcode is nontestimonial—thus rendering a foregone conclusion analysis unnecessary—it nevertheless considered the foregone conclusion doctrine as a “second and separate reason for holding that the trial court erred by denying the State’s motion.” *Id.* ¶ 66. The appellate court found that, in applying the foregone conclusion doctrine, the *Spicer* court erroneously focused on the contents of the phone. *Id.* ¶ 81. Opposing *Spicer*, the appellate court held that the foregone conclusion test applies to the act of producing the passcode rather than to the phone’s contents. *Id.*

¶ 30 Under that framework, the appellate court indicated that, for the foregone conclusion exception to apply, the State must show with reasonable particularity that “(1) it knows the passcode exists, (2) the passcode is within the defendant’s possession or control, and (3) the passcode is authentic.” *Id.* ¶ 98. The appellate court found the State met that burden and concluded that the foregone conclusion exception applied, rendering the act of producing the passcode outside the purview of fifth amendment protection. *Id.* ¶ 102. The appellate court reversed the judgment of the circuit court and remanded for further proceedings. *Id.* ¶ 108. This court allowed defendant’s petition for leave to appeal. Ill. S. Ct. R. 315(a) (eff. Oct. 1, 2021).

¶ 31 II. ANALYSIS

¶ 32 Defendant raises the following issues on appeal, which we have restated as follows: (a) whether the circuit court’s order is appealable under Rule 604(a)(1)

and (b) whether, if compelling defendant to produce the passcode to his cell phone implicates the fifth amendment privilege against self-incrimination, the foregone conclusion doctrine applies as an exception to that privilege.

¶ 33 Before proceeding with our analysis, we acknowledge that this court granted a motion of Indiana, Arkansas, Florida, Idaho, Louisiana, Minnesota, Mississippi, New Jersey, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, and Virginia (collectively, *amici* states) to file an *amicus curiae* brief in support of the State's position on appeal. See Ill. S. Ct. R. 345 (eff. Sept. 20, 2010). Besides agreeing with the State that an order compelling a defendant to unlock a cell phone does not violate the fifth amendment where the knowledge of the passcode is a foregone conclusion, the *amicus curiae* brief also focuses on securing assistance with unlocking encrypted devices, which the *amici* states perceive as important for the effective investigation, prosecution, and prevention of crimes.

¶ 34 We also granted a motion of the American Civil Liberties Union of Illinois, the Electronic Frontier Foundation, the National Association of Criminal Defense Lawyers, and the Illinois Association of Criminal Defense Lawyers to file an *amicus curiae* brief in support of defendant's stance that compelling a defendant to enter a passcode is testimonial under the fifth amendment and that the foregone conclusion doctrine does not apply as an exception to the fifth amendment privilege. We bear in mind the respective positions of the *amici* as we proceed with our analysis of the issues on appeal.

¶ 35 A. Jurisdiction

¶ 36 At the outset, we consider whether the circuit court's judgment is appealable under Rule 604(a)(1). “ ‘Under the 1970 Illinois Constitution, the final authority to prescribe the scope of interlocutory appeals by the State in a criminal case rests exclusively with this court [citation], and whether a particular order may be appealed depends solely upon our construction of our Rule 604(a)(1).’ ” *People v. Drum*, 194 Ill. 2d 485, 488 (2000) (quoting *People v. Young*, 82 Ill. 2d 234, 239 (1980)). Like a statute, the interpretation of a supreme court rule is a question of law requiring *de novo* review. *Id.*

¶ 37 Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2017) limits State appeals in criminal cases, providing, in relevant part: “In criminal cases the State may appeal only from an order or judgment the substantive effect of which results in *** quashing [a] *** search warrant[, or] suppressing evidence ***.” The State’s appeal is also limited to orders that substantially impair the prosecution. *Young*, 82 Ill. 2d at 247. Accordingly, an interlocutory appeal by the State is permitted under Rule 604(a)(1) when the substantive effect of the underlying order results in quashing a search warrant or suppressing evidence and when the prosecutor certifies that the order “substantially impairs the State’s ability to prosecute the case.” *Id.*

¶ 38 In examining a certificate of substantial impairment, this court “rel[ies] solely upon the good-faith evaluation by the prosecutor of the impact of the [appealable] order on his case,” and it is not the role of reviewing courts to second-guess that evaluation. *Id.*; see also *People v. Keith*, 148 Ill. 2d 32, 40 (1992). The principle of the prosecutor’s good-faith evaluation comes into play only if the circuit court’s order has the substantive effect of suppressing evidence or quashing the search warrant. See *People v. Truitt*, 175 Ill. 2d 148, 152 (1997), *abrogated in part on other grounds by People v. Miller*, 202 Ill. 2d 328 (2002). In other words, it must first be determined that the substantive effect of the order is to suppress evidence or quash a search warrant before the certificate of substantial impairment is considered. See *id.*

¶ 39 Here, defendant argues that the circuit court’s judgment denying the motion to compel did not have the substantive effect of quashing the search warrant or suppressing evidence. Defendant stresses that the judgment did not invalidate the search warrant but only limited the *means* by which the State could pursue the search warrant. Thus, defendant maintains that the judgment is not appealable under Rule 604(a)(1).

¶ 40 Defendant cites *In re K.E.F.*, 235 Ill. 2d 530 (2009), and *People v. Lee*, 2020 IL App (5th) 180570, to support his argument. In both cases, the State sought to admit into evidence prior videotaped statements of witnesses, and in both cases, the circuit court found the statements inadmissible because the State failed to meet the burden for admitting evidence. *K.E.F.*, 235 Ill. 2d at 539-40; *Lee*, 2020 IL App (5th) 180570, ¶ 6.

¶ 41 In *K.E.F.*, this court found the circuit court's order unappealable because it did not have the substantive effect of suppressing evidence, as the admissibility of the evidence was "entirely within the State's control." 235 Ill. 2d at 540. This court observed that the order did not prevent information from being presented to the factfinder but only impacted the *means* by which the information could be presented, which did not constitute suppression of evidence. *Id.* On that basis, this court concluded that the circuit court's order was unappealable under Rule 604(a)(1). *Id.* at 540-41.

¶ 42 The *Lee* court observed that the conclusion in *K.E.F.* was based on the fact that the circuit court's judgment left the State with another option to present the pertinent information through live testimony. *Lee*, 2020 IL App (5th) 180570, ¶ 23. The *Lee* court found "no meaningful distinction on this dispositive point" and concluded that it lacked jurisdiction to consider the State's appeal. *Id.*

¶ 43 Here, defendant maintains that *K.E.F.* and *Lee* apply, as the circuit court's judgment denying the State's motion to compel only addressed the *means* by which the State could pursue the search warrant. He asserts that the circuit court acknowledged the validity of the search warrant and did not issue an order preventing the State from pursuing the evidence by some other means. Thus, defendant contends that the circuit court's judgment did not have the substantive effect of quashing the search warrant.

¶ 44 Defendant adds that the circuit court did not suggest that the State would be barred from presenting any evidence at trial and that the State has not established that it will actually find any evidence on the phone. As such, defendant maintains that the circuit court's judgment did not have the substantive effect of suppressing evidence.

¶ 45 The State responds that the order prevented police from executing the search warrant because, unless defendant enters the passcode, there is no means to access the evidence on the phone. Accordingly, the State contends that the order is appealable by the plain terms of Rule 604(a)(1) because it had the substantive effect of quashing the search warrant. The State further contends that the order is appealable because it had the substantive effect of suppressing evidence. The State explains that the search warrant issued for evidence that may be stored only on the

phone and that the order prevented any such evidence from being presented to the factfinder. We agree with the State.

¶ 46 The existence of another means of pursuing evidence has no bearing on the ultimate question posed by Rule 604(a)(1) as applied to the facts of this case: whether the circuit court's order denying the State's motion to compel has the substantive effect of quashing the search warrant or suppressing the evidence. We find defendant's cited cases distinguishable on their facts, as neither involved search warrants or motions to compel production. Rather, both cases involved motions to admit evidence that was readily presentable to the factfinder, already in the State's possession, and "entirely within the State's control." See *K.E.F.*, 235 Ill. 2d at 533, 540; *Lee*, 2020 IL App (5th) 180570, ¶¶ 5, 21. In contrast, here, the evidence is not in the State's possession, not "entirely within the State's control," and thus not readily presentable to the factfinder. See *K.E.F.*, 235 Ill. 2d at 533, 540; *Lee*, 2020 IL App (5th) 180570, ¶¶ 5, 21. Rather, the State sought to obtain evidence on defendant's phone by means of the search warrant, and evidence on the phone was not obtained because the circuit court denied the State's motion to compel. Accordingly, we find *K.E.F.* and *Lee* inapplicable here.

¶ 47 We further note that in *Spicer*—the precedent on which defendant relies to support his fifth amendment arguments—the court considered this jurisdictional issue and stated that, "[w]hen a warrant has been issued allowing a search of a defendant's phone, an order that denies a motion to compel the defendant to decrypt the phone is like an order suppressing evidence." 2019 IL App (3d) 170814, ¶ 11. On that basis, the *Spicer* court concluded that it had jurisdiction to consider the appeal under Rule 604(a)(1). *Id.* ¶ 12. The appellate court here observed the jurisdictional analysis in *Spicer* and likewise concluded it had jurisdiction. 2021 IL App (4th) 210180, ¶ 34.

¶ 48 Defendant cites no Illinois authority contrary to these jurisdictional decisions. However, defendant argues that *Spicer* based its conclusion on the Third District's previous decision in *People v. Krause*, 273 Ill. App. 3d 59 (1995), which defendant contends misinterpreted this court's decision in *Keith* as requiring reliance on the State's certificate of substantial impairment in determining the substantive effect of the circuit court's order. Defendant adds that *Krause* was decided without the benefit of the guidance provided by this court in the more recent *K.E.F.*

¶ 49

Though we find *K.E.F.* distinguishable on its facts, defendant cites this court’s statement in *K.E.F.* that whether an order is appealable depends on the substantive effect of the order and, “[i]n making that determination, we do not defer to the parties or the circuit court.” *K.E.F.*, 235 Ill. 2d at 538. Defendant maintains that, here, the appellate court relied on the assertions in the State’s certificate of substantial impairment to determine the substantive effect of the circuit court’s order under Rule 604(a)(1), which defendant argues “is directly contrary to *K.E.F.*.” We disagree.

¶ 50

The appellate court did not determine the substantive effect of the order based on the State’s certificate but on the statement in *Spicer* that, “ ‘[w]hen a warrant has issued allowing a search of a defendant’s phone, an order that denies a motion to compel the defendant to decrypt the phone is like an order suppressing evidence.’ ” 2021 IL App (4th) 210180, ¶ 32 (quoting *Spicer*, 2019 IL App (3d) 170814, ¶ 11). It was after observing this quote in *Spicer* that the appellate court considered the State’s certificate, which indicated that the circuit court’s order substantially impaired its ability to prosecute the case. *Id.* ¶¶ 32-33.

¶ 51

Subsequently, the appellate court indicated two things: (1) it “accept[ed] the State’s good[-]faith evaluation of the impact of the trial court’s order on its ability to prosecute its case,” and (2) it “agree[d] that the trial court’s order [was] like an order suppressing evidence.” *Id.* ¶ 34. We agree that the substantive effect of the underlying order is a separate question that must be addressed *before* the prosecutor’s evaluation in the certificate is considered. See *Truitt*, 175 Ill. 2d at 152. We further acknowledge that, in the aforementioned statement, the appellate court noted its acceptance of the prosecutor’s evaluation before assenting that the order had the substantive effect of suppressing evidence.

¶ 52

Notwithstanding its wording arrangement, the appellate court nonetheless employed the above quote from *Spicer* before considering the State’s certificate. Moreover, in its analysis, the appellate court separated the principles of the substantive effect of the circuit court’s order and the State’s certificate and made two independent findings based on those principles.

¶ 53

The appellate court’s statement that the order was “like an order suppressing evidence” was a clear reference to the quote in *Spicer*, upon which the appellate court based its determination regarding the substantive effect of the order. See 2021

IL App (4th) 210180, ¶ 34. There is no indication that the appellate court deferred to the State or relied on its certificate to determine the substantive effect of the circuit court's order as defendant suggests.

¶ 54 It is of no consequence that, in the State's certificate, the prosecutor commented on the substantive effect of the order by indicating that the order "effectively suppress[ed] evidence and *** effectively quash[ed] the search warrant." Notwithstanding these assertions, the appellate court's conclusion regarding the substantive effect of the order was independent of its consideration of the certificate. As such, we reject defendant's argument that the appellate court relied on the State's certificate of substantial impairment to determine the substantive effect of the circuit court's order under Rule 604(a)(1).

¶ 55 The search warrant issued allowing a search of defendant's phone, and the circuit court entered an order denying the State's motion to compel defendant to provide the passcode to the phone. In determining whether the circuit court's order effectively quashed the search warrant, we observe that the definition of "quash" is "[t]o annul or make void; to terminate." Black's Law Dictionary (11th ed. 2019). Here, the search warrant authorized officers to search defendant's phone and required defendant to unlock the phone so officers could execute the warrant. The circuit court's denial of the motion to compel eliminated the requirement for defendant to comply with the search warrant. As such, we conclude that the circuit court's order annulled or voided the search warrant; thus, it had the substantive effect of quashing the search warrant.

¶ 56 We further conclude that the circuit court's denial of the motion to compel effectively suppressed evidence. Although the denial did not directly suppress specifically identified evidence, it prevented the State from accessing any evidence on the phone and presenting it to the factfinder, thereby having the substantive effect of suppressing evidence. See *K.E.F.*, 235 Ill. 2d at 540.

¶ 57 Having determined the substantive effects of the circuit court's judgment, we now consider the State's certificate. Defendant argues that the circuit court's order did not substantially impair the State's ability to prosecute this case and that any impairment is questionable at best. Citing *Keith*, defendant contends that, although a reviewing court is permitted "to rely *somewhat* on the State's certificate as to the

issue of impairment [citation], it does not seem necessary for a court to abandon logic in doing so.” (Emphasis added.)

¶ 58 Defendant misrepresents *Keith*, in which this court articulated and implemented its former statement in *Young* that “ ‘we rely *solely* upon the good-faith evaluation by the prosecutor of the impact of the *** order on his case.’ ” (Emphasis added.) *Keith*, 148 Ill. 2d at 40 (quoting *Young*, 82 Ill. 2d at 247). We reject defendant’s suggestion to rely *somewhat* on the State’s certificate. In the State’s certificate, the prosecutor evaluated the effect of the circuit court’s order and indicated that the order substantially impaired the ability to prosecute the case. We accept that good-faith evaluation. See *Young*, 82 Ill. 2d at 247.

¶ 59 We conclude that we have jurisdiction to consider this appeal under Rule 604(a)(1), as the substantive effect of the underlying order results in both quashing the search warrant and suppressing evidence, and the order substantially impaired the State’s ability to prosecute the case.

¶ 60 **B. Fifth Amendment Privilege and the Foregone Conclusion Doctrine**

¶ 61 Having established our jurisdiction over this appeal, we turn to the merits and address the remaining issue: whether, if compelling defendant to produce the passcode to his cell phone implicates the fifth amendment privilege against self-incrimination, the foregone conclusion doctrine applies as an exception to that privilege. “The standard of review for determining whether an individual’s constitutional rights have been violated is *de novo*.” *In re Robert S.*, 213 Ill. 2d 30, 45 (2004). However, we give substantial deference to any factual findings made by the circuit court with regard to defendant’s fifth amendment challenge and will reverse those findings only where they are against the manifest weight of the evidence. *People v. Braggs*, 209 Ill. 2d 492, 505 (2003).

¶ 62 **1. United States and Illinois Constitutions**

¶ 63 The fifth amendment to the United States Constitution provides that no person “shall be compelled in any criminal case to be a witness against himself.” U.S.

Const., amend. V. Strikingly similar, article I, section 10, of the Illinois Constitution provides that “[n]o person shall be compelled in a criminal case to give evidence against himself.” Ill. Const. 1970, art. I, § 10. These provisions of the federal and state constitutions “differ in semantics rather than in substance and have received the same general construction.” *People ex rel. Hanrahan v. Power*, 54 Ill. 2d 154, 160 (1973). The provisions are “virtually identical” and are to be interpreted in lockstep absent substantial grounds to depart from the federal interpretation. *Relsolelo v. Fisk*, 198 Ill. 2d 142, 149-50 (2001).

¶ 64 Though defendant suggests that the rights protected by the privilege “can be [broader] under the State constitution in some cases,” he fails to provide the substantial grounds necessary to justify a departure from the lockstep interpretation in this case. See *id.* Attempting to support his claim, defendant asserts that the Illinois Constitution of 1970 “reflected an intention that the existing state of the law remain unchanged” and that the existing law when the Illinois Constitution was adopted was that the fifth amendment applied not only to compelled testimony but also to the compelled production of private books and papers. See *Boyd v. United States*, 116 U.S. 616, 630-35 (1886).

¶ 65 Defendant avers that it was not until *Fisher*, 425 U.S. 391, that the United States Supreme Court narrowed the rule in *Boyd* by establishing that the compelled production of private papers is permissible if facets of the production are invalidated by the State’s knowledge. Defendant urges that—to the extent the Illinois Constitution recognized the rule in *Boyd* as the existing law—this court should not apply *Fisher*, which restricts that rule as it applies to the Illinois privilege against self-incrimination. We decline to honor defendant’s request.

¶ 66 This court established that “[t]here is nothing in the proceedings of the constitutional convention to indicate an intention to provide, in article I, section 10, protections against self-incrimination broader than those of the Constitution of the United States.” *People v. Rolfinsmeyer*, 101 Ill. 2d 137, 142 (1984). Indeed, those proceedings “reflect[] a general recognition and acceptance of interpretations by the United States Supreme Court” (*id.*) and an intent “that the existing state of the law would remain unchanged” (internal quotation marks omitted) (*id.*), with “[t]he existing state of the law at that time [being] lockstep interpretation of identical or nearly identical language” (*People v. Caballes*, 221 Ill. 2d 282, 293-94 (2006)).

¶ 67

Furthermore, *Fisher* is wholly applicable to the instant case, as it is the seminal precedent for the act of production doctrine. We refuse to disregard it to accommodate defendant's attempt to broaden the scope of the privilege under the Illinois Constitution as opposed to the United States Constitution. For these reasons, we find defendant failed to provide the substantial grounds necessary to warrant departing from the lockstep interpretation and to interpret the Illinois provision as "applying more expansively" than the federal provision in this case. See *Relsolelo*, 198 Ill. 2d at 149-50.

¶ 68

2. Fifth Amendment Principles

¶ 69

A communication violates the fifth amendment if it is testimonial, incriminating, and compelled. *Hiibel*, 542 U.S. at 189. Notably, in the appellate court, the State argued—and the appellate court concluded—that the compelled act of producing the passcode to the phone is nontestimonial for fifth amendment purposes. See 2021 IL App (4th) 210180, ¶ 63. However, before this court, the State now concedes that the compelled act of entering the passcode is testimonial,⁵ thus satisfying the testimonial requirement.⁶ The compulsion requirement is also satisfied, as the State filed a motion to compel defendant to produce the passcode to his phone.

¶ 70

Regarding the incrimination requirement, defendant maintains that the privilege applies to compelled communication that leads to the discovery of incriminating evidence even if the communication itself is neither incriminating nor introduced into evidence. See *Hubbell*, 530 U.S. at 37. We agree but stress that the requirement for the compelled production to be "testimonial" is separate from the requirement for the production to be "incriminating." Moreover, "[i]f a compelled statement is 'not testimonial and for that reason not protected by the privilege, it cannot become [testimonial] because it will lead to incriminating evidence.' " *Doe*, 487 U.S. at 208

⁵The State notes the distinction between producing a passcode by entering it, as opposed to disclosing it to officers. Because the State's motion to compel sought an order that defendant either enter the passcode or disclose it to officers, compliance with the order would not require that defendant disclose the passcode. Thus, the State's discussion of the act of producing a passcode refers to the act of producing it by entering it into an encrypted phone rather than by disclosing it.

⁶Though the State concedes that the act is testimonial, we discuss this aspect in greater detail, *infra*, because the parties disagree as to *why* the act is testimonial.

n.6 (quoting *In re Grand Jury Subpoena*, 826 F.2d 1166, 1171 n.2 (2d Cir. 1987) (Newman, J., concurring)).

¶ 71 Although the State concedes that the act of entering the passcode is testimonial, we ultimately conclude that the testimony implicit in that act is a “foregone conclusion” and thus insufficiently testimonial to be privileged under the fifth amendment. See *Fisher*, 425 U.S. at 411. Accordingly, it is irrelevant that producing the passcode may lead to incriminating evidence. See *Doe*, 487 U.S. at 208 n.6.

3. Act of Production Doctrine

¶ 73 The United States Supreme Court articulated the act of production doctrine in *Fisher*, asserting that “[t]he act of producing evidence in response to a subpoena *** has communicative aspects of its own, wholly aside from the contents of the [evidence] produced.” 425 U.S. at 410. Therefore, the act of production doctrine allows a person to assert his fifth amendment privilege where the mere act of production itself—as opposed to the content of what is being produced—has testimonial implications. See *id.*

4. Testimonial

¶ 75 Again, the State concedes that the compelled act of entering the passcode is testimonial, thus implicating the fifth amendment. However, the parties' disagreement as to *why* the act is testimonial merits discussion. Acts that produce evidence are testimonial under the fifth amendment to the extent that performing such acts "implicitly communicate[s] statements of fact." (Internal quotation marks omitted.) *Hubbell*, 530 U.S. at 36; see also *Doe*, 487 U.S. at 210 (to be testimonial, an act must implicitly or explicitly disclose information or convey a factual assertion). Under this rubric, in *Hubbell*, the United States Supreme Court concluded that the testimonial aspect of a compelled act of production "does nothing more than establish the existence, authenticity, and custody of items that are produced." 530 U.S. at 40-41. Put another way, there are three assertions of fact implicit in a compelled act of producing evidence because the facts are necessary prerequisites to the performance of the act. Those implicit facts are that (1) the

evidence exists, (2) the person producing the evidence possesses or controls it, and (3) the evidence produced is authentic. *Id.*

¶ 76 The State concedes that compelling the production of the passcode is testimonial, but only to the extent that the act implicitly asserts the fact that defendant is able to unlock the phone, which establishes that the passcode exists, defendant possesses or controls the passcode, and the passcode produced is authentic. See *id.* The State acknowledges that many other facts may be inferred by a person entering a passcode, *i.e.*, the phone is registered in the person's name, the person made phone calls or sent text messages using the phone, or the person knows what information is stored on the phone. However, the State explains that, because none of those facts *must* be true for the person to have entered the passcode, none of them are implicitly asserted by the act of entering the passcode.

¶ 77 The State proposes that a cell phone is a container, that entering the phone's passcode merely opens the container, and that the testimony implicit in producing access to the container is different from the testimony implicit in producing the contents of the container. The State explains that compelling a defendant to unlock a phone by entering its passcode is analogous to compelling a defendant to unlock a door by using its key; entering the passcode says nothing about what lies beyond the passcode wall just as unlocking a door says nothing about what lies behind the door.

¶ 78 We find that compelling the act of entering a passcode to a cell phone is testimonial to the extent that performing the act implicitly asserts that the person entering it has the ability to unlock the phone. This implicit assertion is broken down into three components: (1) the passcode exists, (2) the person producing the passcode possesses or controls it, and (3) the passcode produced is authentic. See *id.*

¶ 79 Defendant argues that the compelled act of producing the passcode to his cell phone is testimonial, as it requires "delving into the contents" of his mind (see *Hubbell*, 530 U.S. at 43) and revealing facts not already known by the State. Defendant cites *Seo v. State*, 148 N.E.3d 952, 953 (Ind. 2020), in which the Indiana Supreme Court concluded that compelling the defendant to unlock her phone violated her fifth amendment privilege. The *Seo* court determined that compelling the production of the passcode conveys that (1) the person knows the passcode,

(2) the files on the phone exist, and (3) the person has control over and possession of those files. *Id.* at 955.

¶ 80 Applying *Seo* here, defendant contends that the compelled act of producing the passcode conveys information to the State that it did not previously know, *i.e.*, that defendant knows the passcode, that files exist on the phone, and that defendant has possession and control of those files. See *id.* Defendant adds that the act is protected by the fifth amendment privilege unless the State can show it already knew this information under the foregone conclusion exception. We disagree.

¶ 81 In *Seo*, the court conflated the act of entering a phone’s passcode with the act of producing files from the phone and intermingled those two acts in reaching its conclusion. We agree with *Seo* to the extent that a fact implicit in the act of entering a passcode is that the person knows the passcode. See *id.* However, unlike *Seo*, we observe that the passcode may be entered, regardless of whether any files exist on the phone and regardless of whether the person even has knowledge of—much less possession of or control over—any files. See *id.* For these reasons, *Seo* has no application here.

¶ 82 We further disagree that compelling defendant to enter the passcode is testimonial because it delves into the contents of defendant’s mind. The appellate court in this case aptly observed that “a cell phone passcode is a string of letters or numbers that an individual habitually enters into his electronic device throughout the day” and it “may be used so habitually that its retrieval is a function of muscle memory rather than an exercise of conscious thought.” 2021 IL App (4th) 210180, ¶ 59. We agree that entering a passcode to a cell phone bears no resemblance to the “extensive use of the contents of [the respondent’s] mind” that was required to produce the hundreds of documents in *Hubbell*. (Internal quotation marks omitted.) *Hubbell*, 530 U.S. at 43.

¶ 83 We find it fitting to compare the phone to a container and the passcode to a key and that entering the phone’s passcode opens the container just as using a key unlocks a door. There are many ways to unlock modern cell phones. Besides entering a passcode using a series of letters and/or numbers, cell phones may also be unlocked biometrically by using one’s fingerprint, facial recognition technology, or retina scans. See *State v. Stahl*, 206 So. 3d 124, 135 (Fla. Dist. Ct. App. 2016);

State v. Andrews, 234 A.3d 1254, 1274 (N.J. 2020); Thomas A. Drysdale, *I Can't Quite Put My Finger on It*, 108 Ill. B.J. 26 (2020).

¶ 84 Regardless of what method is used to unlock a cell phone, we find them all equally comparable to using a key to unlock a door, and we decline to distinguish between the methods for purposes of fifth amendment application. We would place form over substance to grant greater fifth amendment protection to those who choose to secure their cell phones with a numeric passcode than to those who choose to do so biometrically. See *Stahl*, 206 So. 3d at 135 (no greater fifth amendment protection warranted for those using number and letter combinations to protect their phones over those using their fingerprints); see also *Andrews*, 234 A.3d at 1274 (holding passcodes exempt from compelled production and biometric codes subject to compelled production is inconsistent and places form over substance).

¶ 85 In sum, we conclude that compelling defendant to enter the passcode to his cell phone is testimonial—not because it involves delving into the contents of defendant’s mind—but because entering the passcode implicitly asserts that defendant is able to unlock the phone, which establishes that the passcode exists, defendant possesses or controls the passcode, and the passcode is authentic. See *Hubbell*, 530 U.S. at 40-41. Because the act of entering the passcode is testimonial, the fifth amendment is implicated, thus warranting a foregone conclusion analysis.

¶86 5. Foregone Conclusion Doctrine

¶ 87 The foregone conclusion doctrine is an exception to the fifth amendment privilege. *Fisher*, 425 U.S. at 411. If the testimony implicit in a compelled act is a “foregone conclusion,” it “adds little or nothing to the sum total of the [State’s] information” and is thus insufficiently testimonial to be privileged under the fifth amendment. *Id.* In other words, the act of production is a foregone conclusion and has no testimonial value where the information derived from the act is already known by the State. See *id.* The foregone conclusion exception applies where the State establishes that, at the time it sought the act of production, it knew with “reasonable particularity” that (1) the evidence existed, (2) the evidence was in defendant’s possession or control, and (3) the evidence was authentic. See *Hubbell*,

530 U.S. at 40-41.

¶ 88

a. *Whether the Foregone Conclusion Doctrine Applies at All*

¶ 89

At the outset, defendant argues that the foregone conclusion doctrine does not apply to the circumstances of this case, reasoning that, historically, the foregone conclusion exception applied to cases involving subpoenaed tax documents or business records and the exception should not be extended to apply to the production of a cell phone passcode.

¶ 90

Defendant cites *Seo*, which raised three concerns with applying the exception to cases involving the unlocking of phones. See 148 N.E.3d at 958-62. First, the *Seo* court opined that, when the *Fisher* court introduced the foregone conclusion exception in the context of the compelled production of business records, it is unlikely the court imagined it applying to the compelled production of passcodes to cell phones, which are capable of storing massive amounts of information. *Id.* at 959-60.

¶ 91

Second, the *Seo* court asserted that the foregone conclusion exception may prove unworkable, given the amount of information contained on modern phones to which access would be provided. *Id.* at 960. The *Seo* court noted—in the context of focusing on the content of the phone—that under the foregone conclusion exception, the government should only be provided those files it can establish knowledge of with reasonable particularity and that unlocking a phone provides broad access not only to the known files, but also to the phone in its entirety. *Id.*

¶ 92

Third, the *Seo* court stated that existing precedent and the narrow application of the foregone conclusion exception weighs against extending it, noting that *Fisher* is the only United States Supreme Court decision in which the foregone conclusion exception has ever applied and that the only two cases discussing the exception—without applying it—did so in the context of grand jury proceedings involving subpoenaed business records. *Id.* at 961. The *Seo* court highlighted the United States Supreme Court’s caution that “when ‘confronting new concerns wrought by digital technology,’ [the Court] ‘has been careful not to uncritically extend existing precedents.’” *Id.* (quoting *Carpenter v. United States*, 585 U.S. ___, ___, 138 S. Ct. 2206, 2222 (2018)).

¶ 93 In addition to *Seo*, defendant cites *Commonwealth v. Davis*, 220 A.3d 534 (Pa. 2019), in which the Pennsylvania Supreme Court refused to apply the foregone conclusion exception to the compelled production of computer passwords (*id.* at 550-52), reasoning that it would significantly expand the rationale of the exception to apply it beyond the context of business records (*id.* at 549). The *Davis* court asserted that applying “the foregone conclusion rationale in these circumstances would allow the exception to swallow the constitutional privilege.” *Id.*

¶ 94 Defendant stresses that modern phones are capable of storing vast amounts of information and that compelling the production of a phone’s passcode compels production of all the information on the phone, in contrast to the specific documents at issue in *Fisher* and its progeny. Accordingly, defendant maintains that applying the foregone conclusion exception here risks allowing the exception to swallow the privilege as applying it to the computer password in *Davis* would have.

¶ 95 The State responds that the foregone conclusion exception applies here because cell phone passcodes have no characteristics requiring that they be uniquely privileged under the fifth amendment. The State notes that, while the *Fisher* court did not announce a universal test to determine the scope of the fifth amendment, the foregone conclusion test was created by applying basic fifth amendment principles and the test has since been repeatedly described in broad terms and has applied to compelled acts besides the production of documents.

¶ 96 The State submits that *Davis* is an outlier with unsound reasoning. The *Davis* court stated that the cases in which the foregone conclusion test applied concerned production of business records, which *Davis* identified as “a unique category of material” for fifth amendment purposes. *Id.* The State points out that, though the *Davis* court described business records as “unique,” it did not elaborate on what was unique about acts of producing business records in comparison to acts of producing other evidence.

¶ 97 Moreover, *Davis* determined that the foregone conclusion exception does not apply to acts of producing passcodes because those acts reveal “information arrived at as a result of using one’s mind.” *Id.* at 549-50. The State responds that this conclusion rests on a fundamental misunderstanding of the test. The State explains that an individual may be compelled to perform an act that implicitly admits to facts that reveal “information arrived at as a result of using one’s mind” (*id.*), so long as

those implicitly admitted facts are foregone conclusions. See *Fisher*, 425 U.S. at 411. We agree with the State.

¶ 98 It is settled that “the attempt to force [a defendant] ‘to disclose the contents of his own mind’ ” necessarily implicates the fifth amendment. See *Doe*, 487 U.S. at 210 (quoting *Curcio v. United States*, 354 U.S. 118, 128 (1957)). However, while disclosing the contents of a defendant’s mind is a relevant consideration in determining whether an act is testimonial for purposes of implicating the fifth amendment, it has no bearing on whether the foregone conclusion test applies. The court in *Davis* conflated these two scenarios. Indeed, where a compelled act of production is deemed testimonial because it requires a defendant to disclose the contents of his mind, a foregone conclusion analysis is necessary, and the exception applies so long as the implicitly admitted facts—even facts that are conveyed as a result of using one’s mind—are foregone conclusions. See *Fisher*, 425 U.S. at 411. Thus, we find *Davis* inapplicable.

¶ 99 Nor is it relevant to the application of the foregone conclusion doctrine that modern phones are capable of storing large amounts of information in comparison to physical documents. As noted *supra*, a cell phone is like a container, and the phone’s passcode is like a key that unlocks the container. The testimony implicit in the act of unlocking a container is the same, regardless of the container’s capacity. Likewise, the testimony implicit in the act of entering the passcode to a cell phone is the same, regardless of the phone’s capacity.

¶ 100 Defendant’s concern—that cell phones contain large amounts of information and that compelling the production of a passcode compels production of all the information on the phone—would be more suitably raised as a challenge to the scope of the search of his phone, which is a fourth amendment issue. Unless the incriminating evidence in question is compelled testimony under the fifth amendment, “its protection stems from other sources.” *Id.* at 401. The fourth amendment protects “against seizures without warrant or probable cause and against subpoenas which suffer from ‘too much indefiniteness or breadth in the things required to be ‘particularly described.’’” *Id.* (quoting *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946)). A defendant is free to challenge a search warrant under the fourth amendment if he believes it is too broad. See *People v. McCavitt*, 2021 IL 125550, ¶ 92 (search exceeding scope of search

warrant presumptively invalid under the fourth amendment). In this case, defendant did not contest the validity of the search warrant under the fourth amendment, and we find the concern with the phone's storage capacity is an unsuitable challenge under the fifth amendment.

¶ 101 Defendant's reliance on *Carpenter* is misplaced, as that case involved fourth amendment implications of "the ability to chronicle a person's past movements through the record of his cell phone signals." 585 U.S. at ___, 138 S. Ct. at 2216. *Carpenter*'s caution against extending existing precedent was made in response to a fourth amendment challenge of using cell phone tower location information to determine whether it was subject to a reasonable expectation of privacy. *Id.* at ___, 138 S. Ct. at 2222. Unlike the fourth amendment, the fifth amendment focuses narrowly on whether a person is compelled to provide self-incriminating testimony. Though advanced technology providing cell phones with greater storage capacity is significant under the fourth amendment, we find it irrelevant to the issue of whether the foregone conclusion exception to fifth amendment protection applies in the context of the compelled production of a cell phone's passcode.

¶ 102 Excluding *Davis*—which we deemed inapposite—there is nothing in the history of the foregone conclusion doctrine to suggest that it does not apply to acts of producing passcodes to cell phones. The consensus of Illinois courts is that the foregone conclusion doctrine applies to the compelled production of cell phone passcodes. Though courts have disagreed as to what facts must be foregone conclusions, none have disputed the actual application of the test in this context. Accordingly, we find the foregone conclusion doctrine is applicable here.

¶ 103 b. *Whether the Proper Focus Is on the Passcode or the Contents of the Phone*

¶ 104 Having found the foregone conclusion doctrine applicable, we observe the conflict among Illinois Appellate Court decisions is whether, in applying the test, the proper focus is on the passcode itself or on the information contained on the phone. In resolving this conflict, we direct our attention to the act at issue: the act of entering the passcode. The State's motion to compel requested the circuit court to order defendant to either provide or enter the passcode. The State did not seek to compel defendant to produce any information contained on the phone, as a search

warrant issued entitling the State to certain information it believes is contained on the phone. In a foregone conclusion analysis, focusing on the contents of the phone would disregard the fact that accessing the contents previously passed a probable cause determination by the circuit court by virtue of the search warrant. Accordingly, any information that may be found on the phone after it is unlocked is irrelevant, and we conclude that the proper focus is on the passcode. As such, *Spicer* is overruled.

¶ 105

c. Applying the Passcode to the Foregone Conclusion Analysis

¶ 106

In focusing on the passcode for purposes of our foregone conclusion analysis, for the exception to apply, the State must establish that, at the time it sought the act of production, it knew with reasonable particularity that (1) the passcode existed, (2) the passcode was within defendant's possession or control, and (3) the passcode was authentic. See *Hubbell*, 530 U.S. at 40-41.

¶ 107

Here, Detective Ummel testified that the phone was passcode protected, defendant had not provided the passcode, and the Clinton Police Department does not have the technology to "crack" the cell phone. This establishes that at the time it sought the act of production, the State knew with reasonable particularity that a passcode existed.

¶ 108

Ummel testified further that the phone was seized from defendant's person upon his arrest and that, on the bail bond sheet, defendant identified the phone number associated with the phone as his own phone number. This establishes that, at the time it sought the act of production, the State knew with reasonable particularity that defendant possessed the passcode.

¶ 109

Finally, we consider the authenticity of the passcode. The *Spicer* court concluded that the State could not satisfy the requirements of the foregone conclusion test because it could not confirm the authenticity of the passcode until after it was used to decrypt the defendant's phone. 2019 IL App (3d) 170814, ¶ 23; see also *Pollard v. State*, 287 So. 3d 649, 656 (Fla. Dist. Ct. App. 2019) (same). On the other hand, the appellate court in this case adopted the views of *Andrews*, 234 A.2d at 1275, and *Stahl*, 206 So. 3d at 136, and concluded that the authenticity

element is satisfied because the passcode is self-authenticating. 2021 IL App (4th) 210180, ¶ 101. Put another way, if the passcode unlocks the phone, the passcode is authentic, and such will be determined when the passcode is entered. *Id.*

¶ 110 We likewise conclude that the authenticity element is satisfied here by the self-authenticating nature of the passcode. We overrule *Spicer*, as its conclusion would not allow the State to utilize the foregone conclusion doctrine unless it could first somehow obtain the passcode by another means, which would necessarily obviate the need for a motion to compel the production of a passcode.

¶ 111 We adopt the reasoning of *Stahl*, in which the court observed:

“[T]he act of production and foregone conclusion doctrines cannot be seamlessly applied to passcodes and decryption keys. If the doctrines are to continue to be applied to passcodes, decryption keys, and the like, we must recognize that the technology is self-authenticating—no other means of authentication may exist. [Citation.] If the phone or computer is accessible once the passcode or key has been entered, the passcode or key is authentic.” 206 So. 3d at 136.

¶ 112 We further observe that, if a valid passcode is not entered, the phone will not open, thus rendering it impossible for an invalid passcode to open the phone. The passcode self-authenticates by opening the phone, which in turn validates the passcode’s authenticity. For these reasons, we conclude that, for purposes of the authentication requirement of the foregone conclusion doctrine, the passcode to a cell phone is self-authenticating when it is entered.

¶ 113 To summarize, the State established that, at the time it sought the act of production, it knew with reasonable particularity that the passcode existed, the passcode was in defendant’s possession or control, and the passcode was self-authenticating. These implicit facts add “little or nothing to the sum total of the [State’s] information.” *Fisher*, 425 U.S. at 411. In other words, the act of entering the passcode has no testimonial value, as the facts implicit in the act are already known by the State. Therefore, the facts are foregone conclusions and insufficiently

testimonial to be privileged under the fifth amendment.⁷ For these reasons, we conclude that the foregone conclusion doctrine applies as an exception to the fifth amendment privilege in this case.

¶ 114

III. CONCLUSION

¶ 115

We conclude as follows: (1) we have jurisdiction to consider this appeal under Rule 604(a)(1), as the substantive effect of the circuit court's judgment results in quashing the search warrant and suppressing evidence and the prosecutor certified that the circuit court's judgment substantially impaired the State's prosecution of the case; (2) compelling the act of producing the passcode to a cell phone by entering it into the phone is testimonial to the extent that performing the act of entering the passcode implicitly asserts that the person entering it has the ability to unlock the phone⁸; (3) the foregone conclusion test is applicable in the context of the compelled production of cell phone passcodes; (4) in applying the foregone conclusion test in this context, the proper focus is on the passcode itself rather than on the contents of the phone; and (5) the foregone conclusion doctrine applies as an exception to the fifth amendment privilege in this case.

¶ 116

For the foregoing reasons, we affirm the judgment of the appellate court, which reversed the circuit court's judgment denying the State's motion to compel and remand for further proceedings.

¶ 117

Appellate court judgment affirmed.

¶ 118

Circuit court judgment reversed.

¶ 119

Cause remanded.

⁷Because the State's motion to compel sought an order for defendant to either enter the passcode or provide it to officers, compliance with the order would not require defendant to disclose the passcode, and this court need not consider whether disclosing the passcode is sufficiently testimonial to be privileged where entering the passcode would not be.

⁸We reject the appellate court's conclusion that the compelled act of producing the passcode is nontestimonial.

¶ 120 JUSTICE NEVILLE, dissenting:

¶ 121 Police, executing a search warrant, obtained the contents of Keiron Sneed's cell phone, but they could not read the encrypted contents. The appellate court ordered Sneed to enter into his cell phone a code that instructs the cell phone to decrypt for police all of its encrypted contents. Because police have all the cell phone's contents, they may use any means at their disposal to decrypt the contents but one: they must not compel Sneed to decrypt or translate the contents of the cell phone. The Illinois Constitution provides: "No person shall be compelled in a criminal case to give evidence against himself ***." Ill. Const. 1970, art. I, § 10. Prosecutors intend to use the decrypted contents to prove Sneed committed forgery. The appellate court's order compels Sneed "in a criminal case to give evidence against himself," and therefore it violates article I, section 10, of the Illinois Constitution. Accordingly, as a consequence of the constitutional restriction, I would affirm the circuit court's order denying the State's motion to compel Sneed to enter the code to decrypt the cell phone's contents.

¶ 122 I. FACTS

¶ 123 Sneed owned a cell phone, which held his phone records, his photographs, records of his searches, his e-mails and text messages, and other personal information. The cell phone automatically coded all of the information Sneed wrote into it and translated the information back from the code when Sneed punched in a brief instruction directing the phone to decrypt its contents.

¶ 124 Police obtained a warrant to arrest Sneed based on allegations that Sneed fraudulently cashed checks from Dairy Queen totaling less than \$1000. When police arrested Sneed, they seized his cell phone. Police subsequently obtained a warrant permitting them to search the cell phone. Police could not decipher the phone's coded contents.

¶ 125 The State filed a motion asking the court to compel Sneed to direct the cell phone to translate for police the cell phone's coded contents so that prosecutors could use the contents to prove Sneed committed forgery. The circuit court denied the motion, and the appellate court reversed. The appellate court, like the majority here, never directly addressed the question of whether the order the State sought

would compel Sneed “in a criminal case to give evidence against himself.”

¶ 126

II. ANALYSIS

¶ 127

We review *de novo* the issue of whether the order the State sought would violate Sneed’s constitutional rights. *In re Robert S.*, 213 Ill. 2d 30, 45 (2004). After finding that this court has jurisdiction over the appeal, the majority holds (1) that, under the lockstep doctrine, this court must treat the United States Supreme Court’s interpretation of the fifth amendment (U.S. Const., amend. V) as a binding interpretation of article I, section 10, of the Illinois Constitution (*supra* ¶¶ 63-66); (2) that the United States Supreme Court’s interpretation of the fifth amendment permits a court to order Sneed to decrypt, decode, or translate the contents of his cell phone for use against him in a criminal case (*supra* ¶¶ 103-13); (3) that the fifth amendment protects only very limited inferences from the act of producing the decryption of the cell phone’s contents (*supra* ¶¶ 72-85); and (4) that the limited protection disappears altogether when the court can find the compelled production amounts to a foregone conclusion (*supra* ¶¶ 86-113). I disagree with the majority’s four propositions.

¶ 128

A. Jurisdiction

¶ 129

The majority asserts the circuit court’s order denying the motion to compel “annulled or voided the search warrant” that permitted the State to search Sneed’s cell phone. *Supra* ¶ 55. The majority misstates the order’s effect. Police have already seized the phone and executed the search warrant. They have the cell phone’s contents, but they cannot read them.

¶ 130

At least two private companies, Cellebrite and Grayshift, claim they can decrypt all cell phones on the market. See, e.g., Mikey Campbell, *Grayshift Claims It Defeated Apple’s Forthcoming “USB Restricted Mode” Security Feature*, Apple Insider (June 14, 2018), <https://appleinsider.com/articles/18/06/14/grayshift-claims-it-defeated-apples-forthcoming-usb-restricted-mode-security-feature> [<https://perma.cc/RY9D-FCDP>]; Thomas Brewster, *The Feds Can Now (Probably) Unlock Every iPhone Model in Existence*, Forbes (Feb. 26, 2018), <https://www.forbes.com/sites/thomasbrewster/2018/02/26/government-can->

access-any-apple-iphone-cellebrite/#9b41da1667a0 [https://perma.cc/4FFH-Y8GL]; see Orin S. Kerr & Bruce Schneier, *Encryption Workarounds*, 106 Georgetown L.J. 989 (2018). Also, “[m]any law enforcement agencies around the country already use one method of gathering encrypted evidence: state-sanctioned hacking.” Adriana Christianson, *Locked Out or Locked Up: The Need for New Guidelines for Compelled Decryption*, 55 Suffolk U.L. Rev. 237, 263 (2022). But the commercial services charge thousands of dollars per project (see Thomas Brewster, *Mysterious \$15,000 “GrayKey” Promises to Unlock iPhone X for the Feds*, Forbes (Mar. 5, 2018), <https://www.forbes.com/sites/thomasbrewster/2018/03/05/apple-iphone-x-graykey-hack/#7683b3a2950f> [https://perma.cc/6GJR-CDDU]; *Cellebrite UFED Series*, SC Mag. (Oct. 1, 2015), <https://www.scmagazine.com/review/cellebrite-ufed-series> [https://perma.cc/4TJD-ZT9Z]), and “[h]acking can be slow and expensive, costing thousands of dollars per device and taking a few weeks or longer, and sometimes it does not even work.” Christianson, *supra*, at 264.

¶ 131 The Illinois State Police, De Witt County, and the Clinton Police Department understandably decided that the prosecution of Sneed for forging less than \$1000 worth of checks did not justify the expense of hacking or commercial decryption. The circuit court’s order denying the State’s motion to compel Sneed to decrypt the cell phone’s contents left the police and prosecutors with a choice of either spending thousands in pursuit of decryption to lead to a conviction for a relatively minor offense or trying to obtain the conviction without the decryption.

¶ 132 Although the order did not annul or void the executed search warrant, it increased the cost of decrypting the cell phone’s contents. The order, by presenting the State with limited choices, effectively suppressed evidence and “substantially impair[ed]” prosecution of Sneed for forgery, and therefore the appellate court had jurisdiction over the State’s appeal. See *People v. Drum*, 194 Ill. 2d 485, 489 (2000); Ill. S. Ct. R. 604(a)(1) (eff. Jan. 1, 2023) (“In criminal cases the State may appeal *** from an order or judgment the substantive effect of which results in *** suppressing evidence ***.”).

¶ 133

B. This Court Should Reject the Lockstep Doctrine

¶ 134

To avoid the central issue in this case—whether the order the State seeks will compel Sneed to give evidence against himself for use in a criminal case—the majority resorts to the lockstep doctrine adopted in *People v. Caballes*, 221 Ill. 2d 282, 312-14 (2006). *Supra* ¶¶ 63, 66. Under the lockstep doctrine, this court must adopt United States Supreme Court interpretations of the United States Constitution, no matter how poorly reasoned, as this court’s interpretation of similar provisions of the Illinois Constitution, unless

“ ‘ “[w]e *** find in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution.” ’ ” *People v. Fitzpatrick*, 2013 IL 113449, ¶ 15 (quoting *Caballes*, 221 Ill. 2d at 310, quoting *People v. Tisler*, 103 Ill. 2d 226, 245 (1984)).

¶ 135

Most importantly, flawed analysis and unpersuasive reasoning do not qualify under *Caballes* as grounds for refusing to adopt the United States Supreme Court’s interpretation of the United States Constitution as a binding interpretation of a parallel provision of the Illinois Constitution. The *Caballes* court discussed other jurisdictions that view flawed reasoning as grounds not to follow United States Supreme Court interpretations of constitutional language (*Caballes*, 221 Ill. 2d at 308), but the majority rejected that approach as one that would leave Illinois with an undesirable “jurisprudence of state constitutional law without regard to federal decisional law except, perhaps, as persuasive authority” (*id.* at 312-13). The *Caballes* court reasserted the limitations first stated in *Tisler*, which did not permit flawed federal analysis to serve as grounds for refusing to adopt a United States Supreme Court interpretation of the United States Constitution as a binding interpretation of similar language in the Illinois Constitution.

¶ 136

The lockstep doctrine received its clearest expression in *People v. Fitzpatrick*, 2011 IL App (2d) 100463, ¶ 12, *aff’d*, 2013 IL 113449, where the court said, “the lockstep doctrine would be largely meaningless if Illinois courts interpreting state constitutional provisions followed only those United States Supreme Court decisions with which they agreed.”

¶ 137 The application of lockstep here particularly lacks justification. This court has expressly held that article I, section 10, of the Illinois Constitution differs significantly from the fifth amendment to the United States Constitution. *People v. McCauley*, 163 Ill. 2d 414, 424 (1994).

¶ 138 McCauley asked the circuit court to suppress the statement he made to police after police prevented his attorney from speaking with him. The *McCauley* court noted that binding United States Supreme Court precedent (*Moran v. Burbine*, 475 U.S. 412, 422-23 (1986)) established that the interrogation did not violate the fifth amendment. *McCauley*, 163 Ill. 2d at 454. The *McCauley* court held that three Illinois Supreme Court decisions, “along with the 1970 Constitutional Convention proceedings, demonstrate that requirements under our State constitutional guarantee (Ill. Const. 1970, art. I, § 10) differ substantially from the Federal and support suppression of defendant’s statements under the circumstances presented here.” *McCauley*, 163 Ill. 2d at 424. The court unequivocally rejected the lockstep doctrine, as the court said,

“in the context of deciding State guarantees, Federal authorities are not precedentially controlling; they merely guide the interpretation of State law. [Citation.] [W]hile this court may, in construing State [constitutional] guarantee[s], look for guidance and inspiration to constructions of Federal guarantee[s] by Federal courts, final conclusions on construction of State guarantee[s] are for this court to decide.” (Internal quotation marks omitted.) *Id.* at 436.

This court later reiterated the principle: “rather than ‘blindly follow the reasoning of a United States Supreme Court decision at all costs,’ this court should rely on its own case law, wisdom and reason to construe our state constitutional provisions.” *People v. Lindsey*, 199 Ill. 2d 460, 467-68 (2002) (quoting *McCauley*, 163 Ill. 2d at 439).

¶ 139 The *McCauley* court emphasized that Bernard Weisberg, the delegate to the constitutional convention who advocated adoption of article I, section 10, assured the other delegates that the section would retain the law then in effect regarding self-incrimination. *McCauley*, 163 Ill. 2d at 440 (citing 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1377 (statements of Delegate Weisberg)). At the time Illinois adopted the 1970 Constitution, the United States Supreme Court

had not yet ruled that police could bar an attorney from contacting a suspect in custody without violating the fifth amendment. The *McCauley* court held that the prior law, the interpretation of the self-incrimination clause in effect in 1970, remained the law in Illinois. *Id.* Again, the *McCauley* court's reasoning conflicts directly with lockstep reasoning.

¶ 140 The *Caballes* majority claimed the lockstep doctrine accorded with *McCauley* while flagrantly ignoring the reasoning of *McCauley*. The *Caballes* majority said “In *McCauley*, however, we did not ascribe a different interpretation to a provision of the state constitution than the Supreme Court had ascribed to the corresponding federal constitutional provision. Rather, we determined that the police conduct at issue implicated state due process concerns.” *Caballes*, 221 Ill. 2d at 300-01. I cannot reconcile the *Caballes* court’s statement with the *McCauley* court’s explicit rejection of the lockstep doctrine and its explicit holding that “requirements under our State constitutional guarantee (Ill. Const. 1970, art. I, § 10) differ substantially from the Federal.” *McCauley*, 163 Ill. 2d at 424.

¶ 141 The three justices who dissented from the majority opinion in *Caballes* reasserted that “‘flawed federal analysis’” must remain grounds for the Illinois Supreme Court to reject the United States Supreme Court’s interpretation of the United States Constitution as a binding interpretation of the Illinois Constitution. *Caballes*, 221 Ill. 2d at 337 (Freeman, J., dissenting, joined by McMorrow and Kilbride, JJ.) (quoting *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1). Flawed federal analysis has no bearing on the applicability of United States Supreme Court precedent under any form of lockstep. See Thomas B. McAfee, *The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine*, 12 S. Ill. U. L.J. 1, 36-43 (1987).

¶ 142 1. Illinois Supreme Court Justices Have
Rejected the Lockstep Doctrine

¶ 143 Apart from the majorities in *McCauley* and *Lindley* and the three justices who dissented in *Caballes*, at least five other justices of the Illinois Supreme Court have rejected the lockstep doctrine.

¶ 144 Justice Clark pointed out that nothing in the history of the Illinois Constitution showed the drafters intended to have the United States Supreme Court finally determine the meaning of the Illinois Constitution. *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 223 (1988) (Clark, J., concurring). By the time of the adoption of the Illinois Constitution in 1970, the United States Supreme Court had made most of the federal bill of rights applicable to the states. *Id.* at 226. Justice Clark noted that “there would be little point in writing parallel guarantees into any State constitution if those guarantees were never to be interpreted more broadly. *** [The drafters] wanted the ‘double protection’ that only State constitutional guarantees could provide.” *Id.*

¶ 145 Justice Heiple emphasized this court’s “nondelegable duties” as the final interpreter of the Illinois Constitution. *People v. Mitchell*, 165 Ill. 2d 211, 234 (1995) (Heiple, J., dissenting). Justices Nickels and Goldenhersh similarly disagreed with the lockstep doctrine. See *In re P.S.*, 175 Ill. 2d 79, 96-97 (1997) (Nickels, J., dissenting, joined by Heiple, C.J.); *People v. Exline*, 98 Ill. 2d 150, 157 (1983) (Goldenhersh, J., dissenting, joined by Simon, J.).

¶ 146 Justice Simon persuasively argued,

“As justices of the highest court of the State of Illinois we take an oath of office to faithfully uphold the provisions of the State Constitution. We cannot delegate that duty to anyone—not to the legislature, nor the Governor, nor to any Federal court.

* * *

In fulfilling our obligation to interpret and apply the Illinois Constitution we are obliged to broadly balance the basic principles contained in that document, and in doing so we are not limited by precedents of the United States Supreme Court. [Citations.] Of course, when we believe that a decision of that court ‘achieves a fair balance between [the relevant] competing objectives’ (*People v. Smith* (1983), 95 Ill. 2d 412, 422), we may choose to follow it. However, when a majority of the United States Supreme Court has adopted an interpretation of the Bill of Rights that we believe is insufficiently ample to effectively implement those guarantees, we are not frozen by it in interpreting the comparable provisions of our State Constitution. [Citations.]

*** [W]hat five United States Supreme Court justices decide is only a binding interpretation of the Federal Constitution. It is the nature of the Federal system that we, as the justices of the Illinois Supreme Court, are sovereign in our own sphere; in construing the State Constitution we must answer to our own consciences and rely upon our own wisdom and insights.” *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 143-47 (1984) (Simon, J., specially concurring).

¶ 147 I agree with Justices Simon, Clark, Freeman, Nickels, Goldenhersh, McMorrow, Kilbride, and the majorities in *McCauley* and *Lindsey*. This court should not treat United States Supreme Court decisions as binding interpretations of the Illinois Constitution. Each supreme court justice should rely on her or his own conscience and wisdom in interpreting the Illinois Constitution.

¶ 148 2. Commentators Argue Lockstep Improperly Prevents This Court From Interpreting the Illinois Constitution

¶ 149 Several commentators agree with Justice Simon and the other justices who would reject the lockstep doctrine. “ ‘Lockstep’ provides for mindless, formalist uniformity. When a state uses ‘lockstep’ it is actually abdicating its role in our federal system.” Timothy P. O’Neill, *Escape From Freedom: Why “Limited Lockstep” Betrays Our System of Federalism*, 48 J. Marshall L. Rev. 325, 332 (2014); see Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 Notre Dame L. Rev. 1015 (1997).

¶ 150 Professor Paul Kauper told the delegates to our constitutional convention that “a state supreme court is free to give the freedoms recognized in the state constitution a reach that transcends interpretations given the fundamental rights by the United States Supreme Court. A state is free to develop its own higher standards.” Paul G. Kauper, *The State Constitution: Its Nature and Purpose*, in Con-Con: Issues for the Illinois Constitutional Convention 3, 23-24 (Victoria Ranney ed., 1970).

¶ 151 Another commentator observed:

“[Lockstep analysis] is a peculiarly uncritical form of realism that takes no account of the possibility of error by the United States Supreme Court. ***

* * *

*** When the only justification offered both for adopting, and later rejecting, a given rule of law, is that in both instances it was the rule of decision in a Supreme Court case, it becomes difficult to imagine defending the practice.” McAfee, *supra*, at 36-43.

¶ 152 McAfee sharply criticized the mistaken assertions about Illinois constitutional history the *Caballes* court used as support for the lockstep doctrine. See *id.* at 20-28. James K. Leven more fully explored the history of the Illinois constitutions in *A Roadmap to State Judicial Independence Under the Illinois Limited Lockstep Doctrine Predicated on the Intent of the Framers of the 1970 Illinois Constitution and Illinois Tradition*, 62 DePaul L. Rev. 63 (2012). Leven notes first that, when the Illinois Supreme Court summarized constitutional history as justification for lockstep interpretations in *Caballes*, the court ignored several cases in which Illinois courts had treated United States Supreme Court cases “as a guide in the search for state constitutional meaning, not the exclusive source of wisdom that it would have been if the Illinois Supreme Court applied a strict lockstep approach.” *Id.* at 73. The *Caballes* majority also misinterpreted the two primary resources on which the constitution’s drafters relied.

¶ 153 According to Leven, George Braden and Rubin Cohn in their treatise, *The Illinois Constitution: An Annotated and Comparative Analysis* (1969),

“noted that one of the reasons for state retention [of the bill of rights] was the primacy of state constitutional law protecting individual rights in circumstances in which the U.S. Supreme Court had denied such protection.

Another reason for retaining state constitutional provisions that are parallel to provisions in the U.S. Bill of Rights, according to Braden and Cohn, was the possibility that the U.S. Supreme Court could, in the future, dilute, weaken, or eliminate U.S. constitutional protection of individual rights in state court proceedings.” Leven, *supra*, at 86.

¶ 154 Leven concluded, “the delegates strived to preserve the power of state court judges to determine the meaning of the Illinois constitution, unshackled from U.S. Supreme Court precedent.” *Id.* at 88. Justice Clark summarized the appropriate standard. “[A]s to our State constitutional provisions, Federal precedents are not *stare decisis*. They are persuasive and not determinative. Where their reasoning persuades us, we should follow them. Where they do not, we should not.” *Joyce*, 126 Ill. 2d at 225 (Clark, J., concurring).

¶ 155 3. Under the Lockstep Doctrine, This Court Lacks the Power to Protect Illinois Citizens

¶ 156 This court must recognize the stakes involved in the debate over lockstep interpretation of the Illinois Constitution. Under the lockstep doctrine,

“this court would be precluded from protecting the civil liberties of Illinois citizens should the United States Supreme Court decide to consistently favor police efficiency over the rights of the accused. *** [The lockstep doctrine] would preclude this court from protecting the individual liberties of Illinois citizens should such protection become essential in the future.” *Tisler*, 103 Ill. 2d at 259 (Clark, J., specially concurring).

When the United States Supreme Court expands its interpretation of the rights protected by the United States Constitution, the expanded rights apply to citizens throughout the country, and no interpretation of a state constitution can authorize governmental intrusion on the protected right. See *People v. Aguilar*, 2013 IL 112116. When the United States Supreme Court diminishes the rights of citizens and permits the expansion of governmental powers over the citizens, under the lockstep doctrine, Illinois must expand the government’s powers to the full extent permitted by the United States Supreme Court, in all but very limited circumstances. See O’Neill, *supra*, at 329-31.

¶ 157 The United States Supreme Court has broadly expanded governmental powers over citizens, leading commentators to advocate for a more federalist approach to constitutional interpretation, under which state courts would recognize that United States Supreme Court interpretations do not bind state court interpretations of state constitutions. “A primary focal point of this new federalism has been state courts’

reliance on state constitutions to provide rights no longer available under the Supreme Court's increasingly restrictive interpretation of the United States Constitution." Robert L. Brown, *Expanded Rights Through State Law: The United States Supreme Court Shows State Courts the Way*, 4 J. App. Prac. & Process 499, 501-02 (2002).

¶ 158 In the years since Illinois adopted its latest constitution, the United States Supreme Court's expansion of government power has affected many different areas of constitutional interpretation. The Court permitted broad restrictions on students' rights to free speech in *Morse v. Frederick*, 551 U.S. 393 (2007). The Court expanded governmental immunity when it ruled victims of violent crimes committed by police lacked standing to sue the city for an injunction against further violent crimes committed by police. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). The Court expanded the government's powers of eminent domain when it ruled that a city's use of eminent domain for economic development did not offend the takings clause of the fifth amendment (U.S. Const., amend. V). *Kelo v. City of New London*, 545 U.S. 469 (2005). Further, in *McCauley*, this court responded to the restriction of fifth amendment rights in *Burbine*, 475 U.S. at 422-23. *McCauley*, 163 Ill. 2d at 435.

¶ 159 The United States Supreme Court has especially expanded government power in the context of the fourth amendment (U.S. Const., amend. IV).

"The government's power to seize individuals who are suspected of crimes—by arresting, stopping, or otherwise detaining them—has expanded significantly in the twenty-first century. The Supreme Court's gradual redefinition of what constitutes a reasonable Fourth Amendment seizure has occurred without meaningful evaluation of whether the government needs additional seizure or detention power." Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 Denv. L. Rev. 53, 53 (2015).

See *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (highway sobriety checkpoints do not violate fourth amendment); *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (police did not violate the fourth amendment when they searched a citizen in a high-crime area because he ran from police); *Kentucky v. King*, 563 U.S. 452, 462-63 (2011) (the exigency exception to the warrant requirement applies even if the police have created the exigency themselves by

knocking and announcing their presence rather than simply obtaining a warrant when possible).

¶ 160 We cannot forget that the United States Supreme Court recently overruled *Roe v. Wade*, 410 U.S. 113 (1973), and restricted the rights of women by holding that the federal constitution does not provide women with a right to abortion. See *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, 142 S. Ct. 2228 (2022). The Court also limited the voting rights of citizens when it struck down as unconstitutional the protections of the Voting Rights Act of 1965 (52 U.S.C. § 10101 *et seq.* (2012)). *Shelby County v. Holder*, 570 U.S. 529, 556-57 (2013). One Supreme Court justice has recommended revisiting the constitutionality of the following established rights: (1) a citizen's right to use contraceptives (*Griswold v. Connecticut*, 381 U.S. 479 (1965)); (2) the right of same-sex couples to marry (*Obergefell v. Hodges*, 576 U.S. 644 (2015)); and (3) the right of same-sex couples to have sexual relations in the privacy of their homes (see *Lawrence v. Texas*, 539 U.S. 558 (2003)). See *Dobbs*, 597 U.S. at ___, 142 S. Ct. at 2301 (Thomas, J., concurring).

¶ 161 The limited lockstep doctrine adopted in *Caballes* requires this court to allow the expansion of governmental powers whenever five justices of the United States Supreme Court approve such expansion, even when this court believes the United States Supreme Court's decision does not persuasively state the intention of the framers of the Illinois Constitution, unless this court finds one of the very limited bases allowed under *Caballes* for refusing to adopt the United States Supreme Court's interpretation. To stress again the most significant aspect of *Caballes*, the decision, like all lockstep (or limited lockstep) decisions, does not allow this court to reject United States Supreme Court decisions based on their flawed analysis or unpersuasive reasoning.

¶ 162 In accord with our responsibility as final authoritative interpreters of the Illinois Constitution, and as protectors of the constitutional rights of Illinois citizens, we must reject the lockstep doctrine entirely. The Illinois Supreme Court justices cited above and the cited commentary persuade me that, especially in light of the rights and principles at stake, this court should partially overrule *Caballes* insofar as the *Caballes* court adopted the limited lockstep doctrine.

¶ 163

4. *Stare Decisis* Should Not Bar This Court From Reconsidering the Lockstep Doctrine

¶ 164

The four justices who signed on the decision in *Caballes* resolved the issue of how this court should interpret provisions of the Illinois Constitution that use language similar to provisions of the United States Constitution. The decision operates as *stare decisis* on the issue.

¶ 165

This court has explained the reasons for adhering to our past decisions:

“The doctrine of *stare decisis* expresses the policy of the courts to stand by precedents and not to disturb settled points. [Citation.] This doctrine is the means by which courts ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. ***

To be sure, *stare decisis* is not an inexorable command. [Citation.] However, we have consistently held that any departure from *stare decisis* must be specially justified [citation] and that prior decisions should not be overruled absent good cause [citations] or compelling reasons [citations]. *** [W]hen a rule of law has once been settled, contravening no statute or constitutional principle, such rule ought to be followed unless it can be shown that serious detriment is thereby likely to arise prejudicial to public interests.” (Internal quotation marks omitted.) *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81-82 (2004).

¶ 166

“[S]tare decisis must not be allowed to obscure the changing needs of society or to veil the injustice resulting from a doctrine in need of re-evaluation.” (Internal quotation marks omitted.) *Froud v. Celotex Corp.*, 98 Ill. 2d 324, 336 (1983). “The tenets of *stare decisis* cannot be so rigid as to incapacitate a court in its duty to develop the law.” *Alvis v. Ribar*, 85 Ill. 2d 1, 24 (1981), superseded by statute on other grounds as stated in *Burke v. 12 Rothschild’s Liquor Mart, Inc.*, 148 Ill. 2d 429, 440-41 (1992). “Stare decisis ought not to be the excuse for decision where reason is lacking. [Citation.] *** [Our] law is free neither of some anomalies, nor of everything illogical, but this is no reason for extending them.” (Internal quotation marks omitted.) *Dini v. Naiditch*, 20 Ill. 2d 406, 416 (1960).

¶ 167

The lockstep doctrine makes no difference for cases in which the United States Supreme Court has reasoned persuasively about the meaning of a provision parallel

to a provision of the Illinois Constitution. The lockstep doctrine also makes no difference when an unpersuasive case expands the rights of individual citizens and restricts the reach of the government, as the individual rights apply to all citizens including the people of Illinois. The lockstep doctrine functions only when the United States Supreme Court uses faulty, unpersuasive reasoning to expand the reach of governmental powers and restrict the rights of citizens. The narrow majority in *Caballes* imposes on the State of Illinois the worst, most poorly reasoned decisions of the United States Supreme Court on the sole grounds that this court cannot find one of the limited bases permitted by *Caballes* for distinguishing the Illinois Constitution from the United States Constitution.

¶ 168 As the *Caballes* dissenters noted, and as Justices Simon, Clark, Heiple, Goldenhersh, and Nickels argued, we must not abdicate our responsibility as final interpreters of the Illinois Constitution. We must not apply United States Supreme Court interpretations of constitutional rights whenever a five-justice majority of the United States Supreme Court adopts an incorrect interpretation of a federal constitutional provision that parallels an Illinois constitutional provision. This case falls within the limited class of cases where this court should not apply *stare decisis*. See *Froud*, 98 Ill. 2d at 336; *Dini*, 20 Ill. 2d at 416. We must not permit our usual adherence to prior decisions to bar us from partially overruling *Caballes* insofar as it adopted the limited lockstep doctrine.

¶ 169 C. This Court Should Not Apply *Fisher* to This Case

¶ 170 The majority uses the lockstep doctrine as authority for inflicting *dicta* from *Fisher v. United States*, 425 U.S. 391, 409 (1976), on the citizens of Illinois, despite the unpersuasive reasoning of *Fisher* and the inapplicability of the case to the facts in Sneed's case. *Supra* ¶¶ 63-67.

¶ 171 The *Fisher* majority had no grounds for making broad pronouncements on the applicability of the fifth amendment to documents a defendant possessed or prepared. The Internal Revenue Service demanded from Fisher's attorneys documents Fisher's accountants prepared. Fisher, unlike Sneed, neither possessed nor wrote the documents. The *Fisher* majority itself specifically distinguished the facts of that case from circumstances like the facts of the case against Sneed, as the

court said, “Special problems of privacy which might be presented by subpoena of a personal diary [citation] are not involved here.” *Fisher*, 425 U.S. at 401 n.7.

¶ 172 Despite the factual limits the *Fisher* Court acknowledged, excepting from its reach personal papers like virtually all of the content of cell phones, the majority here expands *Fisher*, treating it as binding authority for the propositions that (1) the Illinois Constitution permits the State to compel defendants to produce self-incriminating documents, because the self-incrimination clause does not apply to any documents, (2) the self-incriminating aspects of an “act of production” receive only very limited constitutional protection, and (3) the limited protection disappears entirely under the “foregone conclusion” doctrine if the State can show that it already knew what the act of production disclosed. *Supra* ¶¶ 63-102.

¶ 173 1. This Court Should Not Apply *Fisher* to Digital Technology

¶ 174 The expansion of *Fisher* to cases involving demands for owners to decrypt the contents of their cell phones ignores the United States Supreme Court’s warning: “When confronting new concerns wrought by digital technology, [courts should be] careful not to uncritically extend existing precedents.” *Carpenter v. United States*, 585 U.S. ___, ___, 138 S. Ct. 2206, 2222 (2018) (citing *Riley v. California*, 573 U.S. 373, 386 (2014)).

¶ 175 In *Riley*, a police officer seized Riley’s decrypted cell phone in the course of a lawful arrest and found on the phone evidence of criminal activity. *Riley*, 573 U.S. at 378-79. The trial court found the fourth amendment permitted the search. *Id.* at 379. Prosecutors used the evidence from the phone to convict Riley for attempted murder. The California Court of Appeals affirmed the conviction. *Id.* at 379-80.

¶ 176 The United States Supreme Court first noted that in *United States v. Robinson*, 414 U.S. 218 (1973), the court established the principle that a lawful arrest justifies a search incident to the arrest “and a mechanical application of *Robinson* might well support the warrantless searches at issue” in *Riley*. *Riley*, 573 U.S. at 386. The court emphasized the “immense storage capacity” of cell phones, which “could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.” *Id.* The *Riley* Court said:

“First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone’s capacity allows even just one type of information to convey far more than previously possible. The sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions ***. ***

* * *

*** [A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.” (Emphasis in original.) *Id.* at 394-97.

¶ 177 The *Riley* court concluded:

“[W]hile *Robinson*’s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. ***

We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search” *Id.* at 386.

¶ 178 Under the reasoning of *Riley*, this court should not mechanically apply *Fisher* to the content of cell phones. To decide whether to apply *Fisher* under the circumstances of this case, this court should consider the purpose of the protection against compelled self-incrimination and the probable effect of its ruling.

¶ 179 The majority here, like the *Fisher* Court, largely ignores the purposes of the constitutional protection against compelled self-incrimination. The United States Supreme Court explained:

“[The constitutional privilege against self-incrimination] grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the

accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution. It protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness.” *United States v. White*, 322 U.S. 694, 698-99 (1944).

¶ 180 The appellate court’s order here undermines the dignity, humanity, and impartiality of proceedings against Sneed by forcing him to produce for prosecutors decryptions of documents the State will use to prove him guilty of forgery.

¶ 181 The court should also consider the likely effects of extending *Fisher* to digital devices. As one commentator pointed out, “allowing law enforcement such easy access to devices [by compelling defendants to decrypt their phones] does not restore some pre-existing status quo or ideal balance. Rather, it shifts to the government an unprecedented ability to scour very personal and private data that did not even exist twenty years ago.” Laurent Sacharoff, *What Am I Really Saying When I Open My Smartphone? A Response to Orin S. Kerr*, 97 Tex. L. Rev. Online 63, 72 (2019).

¶ 182 Another commentator said:

“the easier it is for police to obtain compelled decryption orders, the more they will do so. ***

*** [W]hen the government seizes a device pertinent to a serious or violent crime, it can invest its resources in unlocking the device or forcing the help of

third parties to try to get what's inside. But government resources are finite. A low bar is an invitation to conduct more searches in more cases by making available at a relatively low cost such a substantial quantum of intimate information about any person. Greater protection will require law enforcement to use these encryption workarounds, forcing the government to pick and choose when it will invest its finite resources and try to decrypt seized devices. It will naturally reserve its finite resources for more serious cases. *** But making it easy for the government to obtain compelled decryption orders ensures that cell phone searches will occur more often. Imposing a state constitutional barrier will reserve this intrusive investigative practice for the serious cases that deserve it." (Internal quotation marks omitted.) David Rassoul Rangaviz, *Compelled Decryption & State Constitutional Protection Against Self-Incrimination*, 57 Am. Crim. L. Rev. 157, 197-98 (2020).

¶ 183 The majority asserts that Sneed's argument concerning the extensive information police will acquire under the appellate court's order reflects only fourth amendment issues. *Supra* ¶ 100. Sneed concedes that police complied with the fourth amendment when they obtained the contents of his cell phone, and he concedes police and prosecutors will not violate his constitutional rights by using those contents to prosecute him. Sneed contests only the means by which prosecutors seek to derive evidence they can present in court from the cell phone. Although police and prosecutors may use any other means available to them to decrypt the cell phone without violating Sneed's rights, Sneed argues they violate the Illinois Constitution if they compel him to give evidence against himself by decrypting the phone. The court must acknowledge the extent of the phone's contents in deciding how and whether to apply existing case law regarding self-incrimination to digital devices. See *Riley*, 573 U.S. at 386-97.

¶ 184 2. This Court Should Not Adopt as Illinois
Constitutional Law the *Fisher* Court's Holding
That the Self-Incrimination Clause Does
Not Apply to Documents

¶ 185 In accord with the reasoning of *White* and the purpose of the self-incrimination clause, Illinois courts have held that the constitution forbids the State from

compelling a defendant to produce documents the State could use as a step in prosecuting the defendant for a crime. *People ex rel. Bowman v. Woodward*, 63 Ill. 2d 382, 386-87 (1976) (constitution forbids the State from compelling the defendant to produce expert witness reports and X-rays); *10-Dix Building Corp. v. McDannel*, 134 Ill. App. 3d 664, 671 (1985) (“cancelled checks and bank deposit slips sought in discovery were precisely the types of documents entitled to fifth amendment protection under *Fisher*”). Finally, this court stated:

“The privilege against self-incrimination forbids the compulsory production of documents, containing assertions made by the person invoking the privilege, [citation] and it has also been held to preclude compulsory production of documents in his possession, even though they do not contain assertions by him, where such documents will furnish a link in the chain of evidence by which he might be convicted of a crime.” *People v. Myers*, 35 Ill. 2d 311, 333 (1966).

¶ 186 Courts of other states have reached similar conclusions. First, in *Armitage v. State*, 13 Ind. 441 (1859), prosecutors charged Armitage with possessing counterfeit bills and sought an order directing Armitage to produce some of the bills. The Supreme Court of Indiana held, “If the notes were really in the possession of the defendant, as alleged in the indictment, the Court could not compel him to produce them on the trial, for the reason that he might be, and if the charge was true, certainly would thereby be, furnishing evidence against himself.” *Id.* at 443. Second, in *Riddle v. Blackburne*, 110 N.Y.S. 748, 748 (App. Div. 1908) (*per curiam*), the plaintiff accused the defendant of libel and sought an order compelling the defendant to produce the allegedly libelous document. The *Riddle* court denied the request, as it said, “[t]he effect of granting this application would compel the defendant to furnish evidence which might be used against him in a criminal prosecution.” *Id.* Third, a Pennsylvania court considering a charge of forgery held the courts could not compel the defendant to produce the allegedly forged document, “for it is a constant and invariable rule that in criminal cases the party shall never be obliged to furnish evidence against himself.” (Internal quotation marks omitted.) *Commonwealth v. Meads*, 11 Pa. D. 10, 12 (1901). Fourth, the prosecutor in *Phillips v. State*, 480 S.W.2d 648 (Tex. Crim. App. 1972), charged the defendant with forging a check, and the trial court ordered the defendant to produce the forged instrument. The court of criminal appeals said, “Requiring the appellant to produce an instrument, in the presence of the jury,

which was the basis of his prosecution violated his Fifth Amendment right to be free from self-incrimination. Appellant's objection that the prosecutor's demand violated that right should have been sustained." *Id.* at 649.

¶ 187 Prior to today, the Illinois Constitution precluded the State from compelling a defendant to produce documents, like cancelled checks, bank records, diaries, phone logs, or Internet search histories, for use against the defendant in a criminal case. See *Lamson v. Boyden*, 160 Ill. 613 (1896); *Myers*, 35 Ill. 2d at 333. This court should reject as unpersuasive the *Fisher* Court's holding that protections against self-incrimination do not apply to demands for documents the defendant wrote or kept.

¶ 188 3. This Court Should Not Adopt the Act of Production
Doctrine as Part of Illinois Constitutional Law

¶ 189 The *Fisher* Court, in *dicta* inapplicable to the facts of the case before it, held that the United States Constitution permitted the federal government to compel a defendant to produce documents the defendant himself wrote because the government had not compelled him to write the documents. *Fisher*, 425 U.S. at 409-10. The *Fisher* Court held that the fifth amendment protected the defendant from only the testimonial implications arising from the act of production. *Id.* at 410-11. The court then radically and indefensibly circumscribed the implications that it would count, ignoring all the implications prosecutors would actually ask triers of fact to draw from the compelled act of production.

¶ 190 Professor Nagareda pedagogically explained with examples some of the errors of the *Fisher* majority:

"The crucial starting point of the act-of-production doctrine is to decouple the content of documents from the act by which they are produced. To determine whether a given act of production triggers the Fifth Amendment, under the logic of Fisher, one must look only to that act itself. Most importantly, one must ignore that the documents themselves are incriminatory in content. As such, the perspective mandated by Fisher takes on an unreal, make-believe quality. It is rather like the Wizard of Oz imploring supplicants to pay no attention to the man behind the curtain. As one commentator accurately

observes: ‘[T]he act-of-production theory is woefully out of touch with the realities of subpoena practice,’ for ‘[b]oth prosecutors and witnesses served with document subpoenas are invariably interested in the documents’ contents, not the testimonial component of the act of production.’ ***

* * *

*** [I]t is the compulsion of that act of giving evidence in itself—whether in the form of speech, production of preexisting documents, or otherwise—that violates the Fifth Amendment. To put the point another way, the compulsion of a person to engage in any production of self-incriminatory ‘evidence’ is unconstitutional, not just compulsion of those acts of production that happen to incriminate the producer above and beyond the content of what is produced.” Richard A. Nagareda, *Compulsion “to Be a Witness” and the Resurrection of Boyd*, 74 N.Y.U. L. Rev. 1575, 1601-03 (1999).

¶ 191 For his argument that the act of production doctrine violated the fifth amendment, Professor Nagareda elucidated the history of the protection against compelled self-incrimination starting with an eighteenth-century case, *The King v. Purnell* (1748) 96 Eng. Rep. 20 (KB). The government charged Purnell with criminal neglect of his duties as vice chancellor of Oxford University because he failed to punish two persons who spoke treasonable words. *Id.* at 20. The government sought to compel the university to produce university statutes establishing the duties of the vice chancellor—but Purnell, as vice chancellor, bore responsibility for responding to the request for documents. *Id.* The court refused to issue the order because courts may not “make a man produce evidence against himself, in a criminal prosecution.” *Id.* The documents constituted evidence of the vice chancellor’s duties because of their contents, not because of an inference arising from the act of production. The *Purnell* court observed the government had a right to inspect the university statutes, including the statutes establishing the vice chancellor’s duties. The court emphasized that the government’s right to the documents did not give the government a right to compel Purnell to produce the documents. *Id.*

¶ 192 Prior to 1769, Lord Mansfield stated as established common law, “in a criminal or penal cause, the defendant is never forced to produce any evidence; though he

should hold it in his hands, in Court.” *Roe v. Harvey* (1769) 98 Eng. Rep. 302, 305 (KB).

¶ 193 Early in the nineteenth century, the United States Supreme Court explained the fifth amendment in a manner that accorded with *Purnell*: “The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties ***.” *United States v. Saline Bank of Virginia*, 26 U.S. (1 Pet.) 100, 104 (1828). State courts followed the same rule. See *Armitage*, 13 Ind. at 442-43; *Riddle*, 110 N.Y.S. at 748; *Meads*, 11 Pa. D. at 12; *Phillips*, 480 S.W.2d at 649.

¶ 194 Illinois courts found defendants protected from compelled document discovery based on the potentially incriminating aspects of the evidence sought without regard to any inference from the act of production. In *Lamson*, 160 Ill. at 617, the plaintiff sought an order compelling the defendant to produce documents showing the defendant cornered the market on corn and doubled its price. The trial court refused to grant the order (*id.*), and the *Lamson* court affirmed, noting that cornering the market on a commodity violated criminal laws and holding that, “[w]henever a witness is excused from giving testimony upon the ground, that his answers will tend to criminate him, or subject him to fines, penalties or forfeitures, he cannot be compelled to produce books or papers which will have the same effect” (*id.* at 618). The content of the books or papers, not the limited inferences the *Fisher* Court permits from an act of production, would show the offense.

¶ 195 The trier of fact would infer from the X-rays and the expert witness reports in *Woodward* that the content of the documents accurately reflected the conditions of their subjects. *Woodward*, 63 Ill. 2d at 386-87. The checks and bank records at issue in *10-Dix* would support an inference that certain transactions occurred, based on the content of the documents and not based on an inference from an act of production. *10-Dix*, 134 Ill. App. 3d at 671. In *People v. Zazove*, 311 Ill. 198, 206 (1924), the court held, “the production of the paper would furnish a link in the chain of evidence by which [the defendant] might be convicted of perjury on the criminal trial, and he was entitled to the benefit of his constitutional right to refuse to furnish that link.”

¶ 196 Professor Sacharoff explains that the inferences arising from an act of production include inferences based on the documents’ content.

“[T]he witness who produces the documents does not intend, *by that act*, to communicate any message at all. The person producing child pornography does not intend that act to be symbolically understood to mean ‘I possess these images.’ Rather, as an inadvertent by-product of the act, we may draw the ordinary inferences that the person possesses the files because that person was able to physically produce them. Or, if a person produces a bank account statement, we may infer the piece of paper is authentic because it came from the person’s files.

The act of producing documents is thus not testimonial or communicative in the ordinary way. ***

*** Producing a hard copy of child pornography *** implicitly and directly communicates possession of the child pornography and likely knowing possession—both central elements of the crime.

*** The use of a password to open a device also communicates that the device likely belongs to the person and that the person possesses, perhaps knowingly, the files on the device.” (Emphasis in original.) Sacharoff, *supra*, at 66-67.

¶ 197

The “fundamental folly of [the *Fisher* Court’s] effort to decouple document content from the act of document production” (Nagareda, *supra*, at 1594) has especially pernicious effect in the context of compelled decryption of cell phone contents. By translating the contents of his cell phone, Sneed will give the State evidence that he possessed specific photographs, he sent specific text messages and e-mails on specific dates, he made specific calls to specific phones, he searched the web for specific information, he videorecorded certain performances of material possibly protected by copyright, or he offered to share videorecordings of copyrighted material in exchange for specific favors (see *United States v. Anderson*, 741 F.3d 938, 946 (9th Cir. 2013) (“a person is guilty of criminal copyright infringement if he or she ‘willfully’ infringes a copyright for the purpose of commercial advantage or private financial gain”)), along with nearly endless

personal information about himself. The cell phone would show (1) whether Sneed received a phone call from a relative or friend from Texas or Florida or Idaho and (2) whether, after he received the phone call, he searched the Internet for information from Planned Parenthood and (3) whether he then contacted an obstetrician or a medical clinic and (4) whether his friend or relative from Texas or Florida or Idaho then came to Illinois for a brief visit and (5) whether the GPS tracker on his phone showed a trip to the obstetrician's office or medical clinic.

¶ 198 Prosecutors will ask the trier of fact here to infer from the content of Sneed's cell phone that he sent a specific image of a check to a bank on a specific date. *Supra* ¶ 15. Prosecutors would not have the evidence of that specific image of a check if Sneed did not instruct the cell phone to decrypt its contents. The fanciful limitation the majority seeks to impose on the implications arising from the compelled production bears no relation to the reality of the inferences the State will tell triers of fact to draw from the production. See Nagareda, *supra*, at 1601-02. The majority expands *Fisher* far beyond its own limits (see *Fisher*, 425 U.S. at 401 n.7), ignoring the United States Supreme Court's warnings about applying prior precedent to the novel circumstances presented by current cell phone and computer technology (see *Carpenter*, 585 U.S. at ___, 138 S. Ct. at 2222). The majority uses *Fisher*, treated as binding authority interpreting the Illinois Constitution, first to abolish Illinois's long-standing protection from compelled production of incriminating documents (*supra* ¶ 65; see *Woodward*, 63 Ill. 2d at 386-87; *Zazove*, 311 Ill. at 206; *Lamson*, 160 Ill. at 618), and second as authority for ordering Sneed to produce for the State the most private and personal information about all aspects of his life. Because the act of production doctrine willfully ignores the most basic implications from a defendant's act of producing incriminating documents, which effectively states "I wrote these incriminating words" or "I kept this incriminating record of my acts," this court should not adopt the act of production doctrine as part of its interpretation of the self-incrimination clause of the Illinois Constitution.

¶ 199 4. This Court Should Not Adopt the Foregone Conclusion Doctrine as Part of Illinois Constitutional Law

¶ 200 The majority finds the production compelled here fits under the *Fisher* Court's doctrine that compelled testimony does not offend the fifth amendment if it counts

as a “foregone conclusion” in that it “adds little or nothing to the sum total of the Government’s information.” *Fisher*, 425 U.S. at 411; *supra* ¶87. Professor Nagareda persuasively explains that the doctrine violates the constitutional protection against self-incrimination.

“Whether a person is compelled to assume the status of a ‘witness against himself’ turns upon what the person is compelled to do by the government—to utter self-incriminatory speech, in the case of interrogation, or to produce self-incriminatory documents, in the case of a subpoena. The status of being a witness against oneself has nothing to do with the extent of the government’s preexisting knowledge of what the witness might have to say, whether orally through speech or implicitly through action. In the trial context, for instance, a witness is no less of a witness when the attorney doing the questioning already knows the answers to the questions that she poses.

*** In no other area of Fifth Amendment discourse does the Court make the protection of that provision depend upon the degree to which the government already knows what the witness is compelled to disclose. To the contrary, it would be just as unconstitutional for the government to compel self-incriminatory oral statements from a person whom the government already knows, to a moral certainty, to have committed a given crime as it would be for the government to compel the exact same statements where the government has little preexisting knowledge of the person’s guilt. When it comes to self-incriminatory oral statements, in other words, the government’s preexisting knowledge is irrelevant. The Fifth Amendment, instead, stands as a prohibition upon a particular method of information gathering in itself, apart from the extent of information that the government already has.” Nagareda, *supra*, at 1597-98.

¶201 In *Commonwealth v. Davis*, 220 A.3d 534 (Pa. 2019), the Commonwealth argued that, under the foregone conclusion doctrine, the court should compel the defendant to decrypt his cell phone. The Pennsylvania Supreme Court echoed Nagareda’s observation, saying,

“ ‘It is as if we were asked to rule that a confession could be coerced from an accused as soon as the government announced (or was able to show) that [in] a future trial it could produce enough independent evidence to get past a motion

for a directed verdict of acquittal.’ ” (Emphasis omitted.) *Id.* at 550 (quoting *Goldsmith v. Superior Court*, 152 Cal. Rptr. 3d 76, 87 n.12 (Ct. App. 1984)).

The court held, “we conclude the compulsion of a password to a computer cannot fit within [the foregone conclusion] exception.” *Id.*

¶ 202 I would hold that, under article I, section 10, of the Illinois Constitution, the extent of the government’s knowledge can never provide grounds for compelling a citizen to produce evidence for the government to use in a criminal prosecution of the citizen. The court should not import from the unpersuasive decision in *Fisher* the ill-considered foregone conclusion doctrine and use it to eliminate the protections promised to Illinois citizens in article I, section 10, of the Illinois Constitution and to expand the government’s power to intrude into all aspects of its citizens’ lives.

¶ 203 D. The Illinois Constitution Forbids Compelled
Decryption of Cell Phones

¶ 204 Because the majority ignores the text of the Illinois Constitution, it never addresses the question of whether the order the State seeks would compel Sneed “in a criminal case to give evidence against himself,” in violation of article I, section 10, of the Illinois Constitution.

“One way to think about compelled decryption is to imagine requiring a witness to take the stand and translate a secret language into English. While one can argue that physically taking the stand and translating a language is unlike unlocking a cell phone, does it not produce the same result? Both require using mental processes to relay facts that are unknown to the prosecution.” Evan Kennedy, *Protecting the Fifth Amendment: Compelled Decryption in Indiana*, 54 Ind. L. Rev. 691, 701 (2021).

¶ 205 One scholar who has advocated for the wide expansion of the government’s power to compel defendants to divulge all the contents of their cell phones, Professor Kerr, argues that entering the code does not translate the documents because the person who enters the code could not, without use of the cell phone, decrypt the text. Because the user does not know how the cell phone encodes and

decodes the text, his acts cannot constitute translation. Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 Tex. L. Rev. 767, 781 (2019).

¶ 206 Kerr's argument ignores the fact that we often use tools to perform tasks we could not perform without the tools. The use of a tool to perform a task one cannot perform without the tool does not change the nature of the act. Punching a telephone number into a telephone's keypad is an act of making a telephone call. Punching the passcode into the cell phone is an act of translating or decrypting all the encoded information back into English.

¶ 207 The order the State seeks here compels Sneed to direct his cell phone to translate for police all the documents stored on his cell phone. A defendant who translates his own diary and phone log into English for police does not assert only that he knows how to translate the documents. He gives police and prosecutors—to use as evidence against him—documents showing that he sent specified text messages or made phone calls to specified phone numbers at specified times, he made specified searches of the Internet, he took specific photographs, and he went to places specified by the cell phone's GPS. He provides police and prosecutors with almost limitless personal information. The appellate court's order compels Sneed, in a criminal case, to give evidence against himself in violation of article I, section 10, of the Illinois Constitution.

¶ 208 E. A Ruling in Favor of Sneed Will Not
Foreclose the Government From Obtaining
Decryptions in Appropriate Circumstances

¶ 209 In cases where the government especially needs the decrypted contents of a cell phone, it has one means always available for overcoming the restrictions of article I, section 10: "the court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce." 725 ILCS 5/106-1 (West 2020). When the court grants such immunity, the witness can no longer claim the protection of section 10, because he no longer faces any threat of criminal prosecution. See *People ex rel. Cruz v. Fitzgerald*, 66 Ill. 2d 546, 549 (1977). "[I]mmunity from use and derivative use is coextensive with the scope of the

privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.” *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

¶ 210

III. CONCLUSION

¶ 211

I agree with the majority that police did not violate Sneed’s constitutional rights when they obtained the encrypted contents of his cell phone. I also agree with the majority that prosecutors would not violate Sneed’s constitutional rights if they use those contents to prosecute Sneed for forgery. However, article I, section 10, of the Illinois Constitution forecloses police and prosecutors from compelling Sneed to decrypt, decode, or translate those contents for use against him in prosecution of criminal charges.

¶ 212

The justices of this court have taken an oath to uphold the Illinois Constitution. In accord with that oath, before this court adopts the United States Supreme Court’s interpretation of constitutional language as a binding interpretation of the Illinois Constitution, this court must critically assess the United States Supreme Court’s reasoning and reject it when it fails to persuade us. Insofar as *Caballes* binds this court to the United States Supreme Court’s constitutional interpretations, even when those interpretations result from unpersuasive reasoning, we must partially overrule *Caballes*.

¶ 213

I would find that, regardless of the *Fisher* Court’s pronouncements about the application of the fifth amendment to documents, the Illinois Constitution forbids court orders compelling individuals to produce self-incriminating documents for use against them in criminal cases. I would reject the distinction between inferences arising from the act of production and inferences arising from the content of the documents produced. I would also reject the foregone conclusion doctrine, as the extent of the government’s knowledge can never overcome the constitutional provision that “[n]o person shall be compelled in a criminal case to give evidence against himself.” Ill. Const. 1970, art. I, § 10.

¶ 214

The appellate court’s order directs Sneed to translate for police incriminating documents the defendant created. The appellate court’s order compels Sneed, in a criminal case, to give evidence against himself in violation of article I, section 10, of the Illinois Constitution. Therefore, I would reverse the appellate court and

affirm the circuit court's order denying the State's motion to compel Sneed to decrypt the contents of his cell phone.

¶ 215 JUSTICE O'BRIEN took no part in the consideration or decision of this case.

APPENDIX B

2021 IL App (4th) 210180
NO. 4-21-0180
IN THE APPELLATE COURT

FILED
November 18, 2021
Carla Bender
4th District Appellate
Court, IL

FOURTH DISTRICT

JUSTICE STEIGMANN delivered the judgment of the court, with opinion. Justices DeArmond and Turner concurred in the judgment and opinion.

OPINION

¶ 1 In February 2021, the State charged defendant, Keiron K. Snead, with two counts of forgery (720 ILCS 5/17-3(a)(1) (West 2020)). The police later sought and obtained a search warrant for defendant’s cell phone but were unable to execute the search because the cell phone was passcode-protected and defendant declined to provide the passcode. The State filed a “Motion to Compel Production of Cellular Phone Passcode,” but the trial court denied that motion. The court ruled that the fifth amendment privilege against self-incrimination prevented defendant from being compelled to provide the passcode to his cell phone.

¶ 2 The State appeals, arguing two reasons why the trial court erred by concluding the fifth amendment protected defendant from being compelled to provide access to his lawfully seized cell phone: (1) compelling defendant to provide access to his cell phone is neither testimonial nor incriminating and (2) the foregone conclusion exception to the fifth amendment applies. Because

we agree with both of the State's arguments, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

¶ 3

I. BACKGROUND

¶ 4

A. The Charges

¶ 5 In February 2021, the State charged defendant by information with two counts of forgery (¶.). The charging documents alleged defendant made two false paychecks from Dairy Queen with the intent to defraud Dairy Queen and “financial institutions.” Defendant and his wife, Allora Spurling, were both arrested in connection with the false paychecks. When they were arrested, the police seized two cell phones from their persons—one from defendant and one from Spurling.

¶ 6

B. The Search Warrant

¶ 7 In March 2021, Detective Todd Ummel of the Clinton Police Department applied for a search warrant to search the contents of both phones. He described the items to be searched as (1) a “Samsung Galaxy A01” “belonging to [defendant]” and (2) a “Samsung Galaxy J2” “belonging to [Spurling.]”

¶ 8

In his complaint for search warrant, Ummel attested to the following information. In January 2021, Sara Schlesinger, a bookkeeper for Dairy Queen in Clinton, Illinois, reported to the Clinton Police Department that she “came across” a paycheck in the amount of \$274.33, payable to defendant. Defendant had never been an employee of Dairy Queen, but his wife—Spurling—was a current employee. Schlesinger reported that the paycheck had been cashed with Citibank via mobile deposit (i.e., through the use of a cell phone). Schlesinger provided Clinton police officer Alex Lovell with a text message Spurling sent to Schlesinger that stated as follows:

“I didn’t know anything about it. I guess it wasn’t meant to happen for real. It [sic]

was being curious and he didn't think it would actually work cuz it wasn't real. He never got the money. *** I'm upset and embarrassed. And pissed. But please know I had no clue about it[.] He doesn't have a card for that bank or anything. Is there a way to call the bank and get the money back cuz he didn't get it[.]”

Schlesinger also provided Ummel with a second paycheck she discovered, payable to defendant in the amount of \$423.22. This check was also deposited by mobile deposit. Schlesinger confirmed the amounts written on the paychecks were taken out of Dairy Queen's bank account.

¶ 9 Ummel also stated in his complaint for search warrant that he sought to search defendant's phone to “confirm whom [sic] deposited the forged paycheck and to determine if any additional forged paychecks have been deposited.” He further sought to “confirm that the text messages from [Spurling] came from her phone.”

¶ 10 The trial court issued a search warrant granting Ummel permission to search both phones.

¶ 11 C. The State's Motion To Compel

¶ 12 A few days later, the State filed a “Motion to Compel Production of Cellular Phone Passcode” in defendant's case, which requested an order “to compel the entry of a passcode into a cellular device.” The motion alleged that the police were prevented from executing the search warrant because both phones were passcode-protected. (We note that this appeal pertains only to defendant and access to the cell phone identified as his in the search warrant.)

¶ 13 Later that same month, the trial court conducted an evidentiary hearing on the State's motion, at which Ummel was the sole witness. He testified that the Clinton Police Department was contacted by “[m]anagement” at Dairy Queen “[r]egarding fraudulent checks that were cashed on the account of Dairy Queen.” Defendant had never been employed at Dairy Queen,

but defendant's wife was an employee at the time the checks were cashed. Ummel testified that both checks were cashed via mobile electronic deposit from a cellular phone. Ummel explained that mobile deposit involves taking a photograph of a check and sending it electronically to a financial institution for deposit.

¶ 14 Ummel further testified that he observed pictures of the two cashed checks. (The record does not state where Ummel viewed the photographs, who showed him the photographs, or whether they were physical or electronic photographs.) They were payable to defendant and endorsed with the signature "Keiron Sneed." Ummel also stated that Schlesinger provided him with text messages in which Spurling admitted defendant cashed the checks. Schlesinger also provided Ummel with bank records that showed the funds were missing from the Dairy Queen account.

¶ 15 Ummel also testified that he obtained the search warrant to search defendant's and Spurling's cell phones but discovered the phones were locked by security passcodes. He stated defendant and Spurling would not provide him with the passcodes. The Clinton police did not have the technology to "crack" the phone, and the agency that assisted him in the past—the Illinois State Police—would not assist unless his investigation involved narcotics.

¶ 16 Ummel further testified that, following defendant's arrest, defendant filled out a bond form and provided a phone number that matched the phone that was seized from him. Ummel testified he was "hoping to find *** that a photograph exists on that device from submitting the mobile deposit."

¶ 17 D. The Trial Court's Ruling

¶ 18 The trial court denied the State's motion. The court first noted that the fifth amendment privilege against self-incrimination applies only when an accused is compelled to

make a testimonial communication that is incriminating. But then, relying on *People v. Spicer*, 2019 IL App (3d) 170814, 125 N.E.3d 1286, the court found that the act of producing a cell phone passcode is testimonial.

¶ 19 The trial court then examined whether the foregone conclusion doctrine—an exception to the fifth amendment privilege—applied to the facts of this case. Again relying on *Spicer*, the court found that, for the doctrine to apply, the State must show with reasonable particularity that, when it sought the act of production, it “knew the evidence existed, the evidence was in the [d]efendant’s possession and it was authentic.” The court noted (1) a valid search warrant had issued for the phone’s contents, which defendant did not challenge, and (2) law enforcement has a right to access the contents of the cell phone. The court concluded, however, that it “would be speculation *** to presume at this point that the photograph would still be on the phone,” and it “[could not] find here that it’s more likely to be found on the [d]efendant’s phone any more than it might be on the [co-defendant’s] phone.” Accordingly, the court found that the State did not show the foregone conclusion doctrine applied and denied the State’s motion to compel defendant to provide access to his cell phone.

¶ 20 The State filed a certificate of substantial impairment, and this appeal followed. Ill. S. Ct. R. 604(a)(1) (eff. July 1, 2017).

¶ 21 **II. ANALYSIS**

¶ 22 The State appeals, arguing two reasons why the trial court erred by concluding the fifth amendment protected defendant from being compelled to provide access to his lawfully seized cell phone: (1) compelling defendant to provide access to his cell phone is neither testimonial nor incriminating and (2) the foregone conclusion exception to the fifth amendment applies.

¶ 23 Defendant initially responds that the State’s appeal should be dismissed for lack of

jurisdiction because the trial court’s order did not have the substantive effect of quashing the search warrant and suppressing evidence, as required by Rule 604(a)(1). *Id.* Alternatively, defendant argues that (1) the compelled production of a cell phone passcode is an act of production that is protected by the fifth amendment and (2) the foregone conclusion doctrine does not apply to the facts of this case.

¶ 24 Because we agree with both of the State’s arguments, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

¶ 25 A. The Standard of Review

¶ 26 We review *de novo* whether the State may take an interlocutory appeal under Rule 604(a). *People v. Drum*, 194 Ill. 2d 485, 488, 743 N.E.2d 44, 46 (2000).

¶ 27 We apply a bifurcated standard of review to the trial court’s determination that the fifth amendment privilege protects defendant from being compelled to provide his passcode. First, we “accord great deference to the trial court’s factual findings, and *** reverse those findings only if they are against the manifest weight of the evidence.” *In re G.O.*, 191 Ill. 2d 37, 50, 727 N.E.2d 1003, 1010 (2000). Next, we review *de novo* the ultimate question of whether the privilege applies. *Id.*; see also *Spicer*, 2019 IL App (3d) 170814, ¶ 14 (citing *People v. McRae*, 2011 IL App (2d) 090798, ¶ 25, 959 N.E.2d 1245); *In re A.W.*, 231 Ill. 2d 92, 106, 896 N.E.2d 316, 324 (2008) (“The standard of review for determining whether an individual’s [fifth amendment] rights have been violated is *de novo*.” (Internal quotation marks omitted.)).

¶ 28 In this case, Ummel was the sole witness at the hearing on the State’s motion to compel, and the trial court appeared to have no difficulty accepting his testimony. Thus, like the trial court, we will accept his testimony and now review *de novo* the trial court’s determination that the fifth amendment privilege against self-incrimination protected defendant from being

compelled to provide his passcode.

¶ 29

B. Jurisdiction

¶ 30 Defendant first argues that the State's appeal should be dismissed for lack of jurisdiction under Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2017) because the trial court's denial of the State's motion to compel did not have the substantive effect of quashing the search warrant and suppressing evidence. Defendant also contends that the impairment of the State's case is questionable. The State responds that the court's order precluded the State from accessing the information on the phone, which is no different than precluding the State from presenting the information on the cell phone at trial. We agree with the State.

¶ 31 Rule 604(a)(1) reads as follows: "When State May Appeal. In criminal cases the State may appeal only from an order or judgment the substantive effect of which results in *** quashing an arrest or search warrant; or suppressing evidence." Id.

¶ 32 Before the State may obtain review of a suppression order under Rule 604(a), the State must certify to the trial court that the suppression order substantially impairs its ability to prosecute the case. *People v. Turner*, 367 Ill. App. 3d 490, 494, 854 N.E.2d 1139, 1143 (2006). "A good-faith evaluation by the prosecutor of the impact of a suppression order is sufficient to meet the State's burden." Id. at 495 (citing *People v. Keith*, 148 Ill. 2d 32, 40, 591 N.E.2d 449, 452 (1992)); see also *People v. Young*, 82 Ill. 2d 234, 247-48, 412 N.E.2d 501, 507 (1980). "[T]he substantive effect of a trial court's pretrial order, not the label of the order or its underlying motion, controls appealability under Rule 604(a)(1)." *Drum*, 194 Ill. 2d at 489. We agree with what the Third District wrote in *Spicer*: "When a warrant has issued allowing a search of a defendant's phone, an order that denies a motion to compel the defendant to decrypt the phone is like an order suppressing evidence." *Spicer*, 2019 IL App (3d) 170814, ¶ 11.

¶ 33 Here, the State filed a certificate of substantial impairment, attesting that the trial court’s order “effectively suppresse[s] evidence and prevent[s] the State from acquiring evidence pursuant to a search warrant issued by the Court, thereby effectively quashing the search warrant, substantially impair[ing] [the State’s] ability to prosecute this cause.”

¶ 34 We accept the State’s good faith evaluation of the impact of the trial court’s order on its ability to prosecute its case and agree that the trial court’s order is like an order suppressing evidence. Accordingly, we conclude that we have jurisdiction to hear this appeal.

¶ 35 C. The Fifth Amendment Privilege Against Self-Incrimination

¶ 36 1. The Applicable Law

¶ 37 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.” U.S. Const., amend. V. The Illinois Constitution similarly provides, “No person shall be compelled in a criminal case to give evidence against himself ***.” Ill. Const. 1970, art. I, § 10. The state and federal constitutional privileges against self-incrimination “differ in semantics rather than in substance and have received the same general construction.” *People ex rel. Hanrahan v. Power*, 54 Ill. 2d 154, 160, 295 N.E.2d 472, 475 (1973).

¶ 38 The privilege against self-incrimination is intended to protect an accused “from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.” *Doe v. United States*, 487 U.S. 201, 213 (1988) (*Doe II*). “[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating.” (Emphasis omitted.) *Fisher v. United States*, 425 U.S. 391, 408 (1976). “To establish a fifth amendment violation,

appellants must therefore demonstrate the existence of three elements: 1) compulsion, 2) a testimonial communication, and 3) the incriminating nature of that communication.” *In re Grand Jury Subpoena*, 826 F.2d 1166, 1168 (2d Cir. 1987).

¶ 39

a. What Constitutes a Testimonial Communication

¶ 40 “[T]o be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.” *Doe II*, 487 U.S. at 210. It is “the attempt to force [a suspect] ‘to disclose the contents of his own mind,’ [citation] that implicates the Self-Incrimination Clause.” *Id.* at 211 (quoting *Curcio v. United States*, 354 U.S. 118, 128 (1957)). This requirement that the compelled communication assert a fact or disclose information explains why certain acts, although incriminating, are not testimonial and do not enjoy fifth amendment protection. See, e.g., *Schmerber v. California*, 384 U.S. 757, 765 (1966) (a suspect may be compelled to furnish a blood sample); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (handwriting exemplar); *United States v. Dionisio*, 410 U.S. 1, 7 (1973) (voice exemplar); *United States v. Wade*, 388 U.S. 218, 221-22 (1967) (stand in a lineup). The United States Supreme Court has explained that the fifth amendment’s protections are limited to “testimonial” communications because “there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating.” *United States v. Hubbell*, 530 U.S. 27, 34-35 (2000).

¶ 41

For example, in *Doe II*, 487 U.S. at 215-19, the Supreme Court held that an order compelling the petitioner—who was the target of a grand jury investigation—to sign an authorization that permitted foreign banks to disclose records of his accounts (if any existed) had no testimonial significance because the mere act of signing the form made no statement, implicit or explicit, regarding the existence of any foreign bank account, control over any such account, or

the authenticity of any records produced by any bank. The authorization was carefully drafted in the hypothetical to not refer to any specific bank or account number so that it would not serve as an acknowledgement by the target of the existence of any foreign bank account, his control over any bank account, or the authenticity of any documents produced. *Id.* at 215-16. The Court rejected the petitioner's "blanket assertion" that a statement is testimonial if its content can be used to obtain evidence. *Id.* at 208 n.6. In doing so, the Court reasoned that this argument "confuses the requirement that the compelled communication be 'testimonial' with the separate requirement that the communication be 'incriminating.'" *Id.* "If a compelled statement is 'not testimonial and for that reason not protected by the privilege, it cannot become so because it will lead to incriminating evidence.'" *Id.* (quoting *In re Grand Jury Subpoena*, 826 F.2d at 1171 n.2 (Newman, J., concurring)).

¶ 42 Certain communicative acts, however, may be testimonial for purposes of the fifth amendment. For example, the act of producing documents in response to a subpoena could have "communicative aspects of its own, wholly aside from the contents of the papers produced." *Fisher*, 425 U.S. at 410; see also *Hubbell*, 530 U.S. at 36 ("[T]he act of producing documents in response to a subpoena may have a compelled testimonial aspect."). "Compliance with [a] subpoena tacitly concedes the existence of the papers demanded and their possession or control by the [person subpoenaed]." *Fisher*, 425 U.S. at 410. This is known as the "act of production" doctrine, which "permits an individual to assert his fifth amendment privilege against self-incrimination and refuse to produce subpoenaed documents where the mere act of production, rather than the content of the documents, has testimonial ramifications." *In re Grand Jury Subpoena Duces Tecum No. 001144*, 164 Ill. App. 3d 344, 347, 517 N.E.2d 1157, 1159 (1987).

¶ 43 b. The Foregone Conclusion Doctrine

¶ 44 A corollary doctrine—also formulated in *Fisher*—that serves as an exception to the act of production doctrine is the “foregone conclusion” doctrine. Under this doctrine, the testimonial value of the act of production is lost where the information conveyed by the act of production is already known by the State. *Fisher*, 425 U.S. at 411. For this exception to apply, the State must establish its knowledge of (1) the existence of the information demanded, (2) the possession or control of that information by the defendant, and (3) the authenticity of the information. *Commonwealth v. Gelfgatt*, 11 N.E.3d 605, 614 (Mass. 2014) (citing *Fisher*, 425 U.S. at 410-13); see also *United States v. Bright*, 596 F.3d 683, 692 (9th Cir. 2010). Where these elements are satisfied, the testimony implied by the defendant’s act of production is a “foregone conclusion” that “adds little or nothing to the sum total of the Government’s information.” *Fisher*, 425 U.S. at 411. In that case, “no constitutional rights are touched. The question is not of testimony but of surrender.” (Internal quotation marks omitted.) *Id.*

¶ 45 Thus, the United States Supreme Court has identified two means by which an act of production is not testimonial and, as such, falls outside the protection of the fifth amendment: (1) where the act of production compels a mere physical act (*Doe II*, 487 U.S. at 215) and (2) where the act of production conveys information that is a “foregone conclusion” (*Fisher*, 425 U.S. at 410-14). For the reasons that follow, we conclude the trial court erred because both means apply to the facts of this case.

¶ 46 2. This Case

¶ 47 a. Testimonial vs. Non-testimonial

¶ 48 The State first argues that compelling defendant to provide entry to his passcode-protected phone is not a testimonial act of production because it is a mere physical act, such as providing a thumbprint, blood sample, or voice exemplar. Defendant responds that

compelling him to provide access to his passcode-protected phone is a testimonial act of production because it requires him to utilize the “contents of his mind.” See *Hubbell*, 530 U.S. at 43; *Doe II*, 487 U.S. at 210 n.9. Defendant contends the act of providing entry to his cell phone is more like “telling an inquisitor the combination to a wall safe” than “being forced to surrender the key to a strongbox.” See *Hubbell*, 530 U.S. at 43; see also *Doe II*, 487 U.S. at 210 n.9.

¶ 49 Consistent with defendant’s position, several courts have held the compelled production of a passcode or decryption key to be a testimonial act because it reveals the “contents of the person’s mind.” See, e.g., *In re Search Warrant Application for [Redacted Text]*, 279 F. Supp. 3d 800, 806 (N.D. Ill. 2017); *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012); *United States v. Kirschner*, 823 F. Supp. 2d 665, 668-69 (E.D. Mich. 2010). Under this rationale, the “physical/mental production” dichotomy is “a critical distinction” in determining whether an act is testimonial or non-testimonial. *Commonwealth v. Davis*, 220 A.3d 534, 547-48 (Pa. 2019) (“Consistent with a physical/mental production dichotomy, in conveying the combination to a wall safe, versus surrendering a key to a strongbox, a person must use the ‘contents of [his] own mind.’ ”).

¶ 50 However, an examination of the origin of the “mental/physical production” dichotomy leads us to question whether it is properly applied in the context of compelled access to a passcode-protected phone.

¶ 51 i. The Origins of the Mental/Physical Production Dichotomy

¶ 52 The dichotomy originates in *Doe II*, where the United States Supreme Court determined that the petitioner was not protected by the fifth amendment from being compelled to sign an authorization that would allow foreign banks to disclose documents relating to his accounts, if those accounts existed. *Doe II*, 487 U.S. at 203, 215. Justice Stevens dissented and

opined that a defendant cannot “be compelled to use his mind to assist the prosecution in convicting him of a crime.” *Id.* at 219 (Stevens, J., dissenting). He reasoned that a defendant “may in some cases be forced to surrender a key to a strongbox containing incriminating documents, but I do not believe he can be compelled to reveal the combination to his wall safe—by word or deed.” *Id.* The majority addressed Justice Stevens’s analogy and expressed its agreement that “[t]he expression of the contents of an individual’s mind” is testimonial but disagreed that the execution of the authorization at issue “forced [the] petitioner to express the contents of his mind.” (Internal quotation marks omitted.) *Id.* at 210 n.9 (majority opinion). The majority believed the compelled execution of the authorization was more like surrendering a key than providing a combination. *Id.*

¶ 53 Thereafter, in *Hubbell*, a case involving a subpoena duces tecum, the Supreme Court rejected the government’s argument that the respondent’s act of producing documents was merely a physical act. *Hubbell*, 530 U.S. at 41-43. The government’s subpoena sought the production of 11 categories of documents. *Id.* at 31. The respondent “produced 13,120 pages of documents and records and responded to a series of questions that established that those were all of the documents in his custody or control that were responsive to the commands in the subpoena.” *Id.* The Court observed the following:

“The assembly of literally hundreds of pages of material in response to a request for ‘any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to’ an individual or members of [respondent’s] family during a 3-year period *** is the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition.” *Id.* at 41-42.

The Court also observed that the respondent “took the mental and physical steps necessary to

provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena.” *Id.* at 42. The Court explained the government’s possession of the documents was not the fruit of a mere physical act of production. Instead, “it was unquestionably necessary for respondent to make extensive use of ‘the contents of his own mind’ in identifying the hundreds of documents responsive to the requests in the subpoena.” *Id.* at 43. The Court then repeated Justice Stevens’s analogy from *Doe II*, observing, “[t]he assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox.” *Id.*

¶ 54 ii. Lower Courts' Interpretations

¶ 55 Several courts have since held that the compelled production of a passcode (or unlocked/decrypted device) is a testimonial act of production because it requires the use of the “contents of the mind.” See, e.g., *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d at 1346 (“[T]he decryption and production of the hard drives would require the use of the contents of [the defendant’s] mind.”); *G.A.Q.L. v. State*, 257 So. 3d 1058, 1061 (Fla. Dist. Ct. App. 2018) (“[R]evealing one’s password *** probes into the contents of an individual’s mind.”); *Davis*, 220 A.3d at 548 (“[O]ne cannot reveal a passcode without revealing the contents of one’s mind.”). This group includes the only Illinois court to address the issue, *Spicer*, 2019 IL App (3d) 170814, discussed in further detail *infra*, ¶¶ 72-81.

¶ 56 Other courts have questioned whether the strongbox key/wall safe combination analogy is appropriate for the digital world. See *State v. Stahl*, 206 So. 3d 124, 135 (Fla. Dist. Ct. App. 2016) (“We question whether identifying the key which will open the strongbox—such that the key is surrendered—is in fact, distinct from telling an officer the combination. More importantly, we question the continuing viability of any distinction as technology advances.”);

State v. Andrews, 234 A.3d 1254, 1274 (N.J. 2020) (“[I]n some cases, a biometric device lock can be established only after a passcode is created, calling into question the testimonial/non-testimonial distinction in this context.”). Although the Andrews court ultimately held that the production of a passcode is testimonial, it noted that “passcodes are a series of characters without independent evidentiary significance and are therefore of ‘minimal testimonial value’—their value is limited to communicating the knowledge of the passcodes.” *Id.* at 1274 (citing *United States v. Apple MacPro Computer*, 851 F.3d 238, 248 n.7 (3d Cir. 2017)).

¶ 57 The Andrews and Stahl courts also expressed concern that, under the physical/mental dichotomy, fifth amendment protection may apply to a phone that is protected by a numeric passcode, but not to a phone protected by a thumbprint. See, e.g., Andrews, 234 A.3d at 1274 (“We also share the concerns voiced by other courts that holding passcodes exempt from production whereas biometric device locks may be subject to compulsion creates inconsistent approaches based on form rather than substance.”); Stahl, 206 So. 3d at 135 (“[W]e are not inclined to believe that the Fifth Amendment should provide greater protection to individuals who passcode protect their iPhones with letter and number combinations than to individuals who use their fingerprint as the passcode.”).

¶ 58 iii. This Court’s Conclusion: Production of a Passcode Is Non-testimonial

¶ 59 The questions raised in Stahl and Andrews regarding the continued viability of the key/combination analogy (i.e., mental/physical dichotomy) in the digital age deserve consideration. We, too, observe that a cell phone passcode is string of letters or numbers that an individual habitually enters into his electronic device throughout the day. A passcode may be used so habitually that its retrieval is a function of muscle memory rather than an exercise of conscious thought. A fair question that arises, then, is whether the rote application of a series of numbers

should be treated the same as the Hubbell respondent’s “exhaustive use of the ‘contents of his mind’ ” to produce hundreds of pages of responsive documents. The two scenarios appear to bear no resemblance to each other.

¶ 60 We share the concerns expressed in *Stahl* and *Andrews* and observe that, given the advancements in technology, a cell phone passcode is more akin to a key to a strongbox than a combination to a safe. Or, at the very least, perhaps in this digital age the distinction between a physical key and a combination to a safe has become blurred, with a cellular phone passcode encompassing both. This blurring of distinctions would diminish the analytical value of the analogy that so many courts have relied on to hold that the act of providing a passcode is testimonial.

¶ 61 Moreover, at least one federal court has hinted that the act of unlocking a phone may not be testimonial if (1) no dispute exists that the suspect owns the phone, (2) the suspect is not asked to reveal the passcode to the police, and (3) the suspect makes the contents of her cell phone accessible to the police by entering it herself without telling the police the passcode. See *United States v. Oloyede*, 933 F.3d 302, 309 (4th Cir. 2019) (“[Defendant] has not shown that her act communicated her cell phone’s unique passcode. Unlike a circumstance, for example, in which she gave the passcode to an agent for the agent to enter, here she simply used the unexpressed contents of her mind to type in the passcode herself.”). In *Oloyede*, the defendant entered the passcode herself and gave the unlocked phone to the police officer. *Id.* at 308. The officer did not ask for the passcode or observe the defendant enter the passcode, and the defendant did not reveal the passcode to the police. *Id.* Similarly, in the case before us, the State is requesting an order that the defendant “provide entry” to his cell phone. That means that defendant, like the defendant in *Oloyede*, could simply enter his passcode into his phone and thereby make its contents accessible

to the police without ever telling the police the passcode.

¶ 62 Notably, the trial court in this case, when ruling on the State's motion, expressed its belief that the facts here were "no different than compelling a Defendant to disclose a key to a storage unit or a lockbox or something of that nature." The court then observed, "Here, disclosing the passcode would not seem to make extensive use of the contents of the Defendant's mind" and expressed its opinion that "an objective, reasonable judge could reach the conclusion that the production of the pass code is not testimonial." However, the court correctly acknowledged that it was obligated to follow the Third District's holding in *Spicer* that the production of a passcode is testimonial because no other Illinois court of review had yet spoken on the issue.

¶ 63 For the reasons stated, we conclude that requiring defendant to provide entry or the passcode to the phone does not compel him to provide testimony within the meaning of the fifth amendment.

¶ 64 b. The Foregone Conclusion Doctrine

¶ 65 The State also argues that even if we conclude that the act of providing entry or the passcode to defendant's phone is testimonial, the foregone conclusion doctrine applies. The State contends the trial court erred in its application of the foregone conclusion doctrine because it equated the act of providing access to the phone with the act of collecting the evidence from the phone. Defendant responds that the trial court properly found the foregone conclusion doctrine did not apply because the State did not establish that, at the time it requested production, it knew of the existence, possession, and authenticity of the information it sought within the phone.

¶ 66 We agree with the State that the foregone conclusion doctrine applies. This conclusion is a second and separate reason for holding that the trial court erred by denying the State's motion.

¶ 67

i. The Proper Focus of the Foregone Conclusion Analysis

¶ 68

(a) Passcode vs. Contents of the Phone

¶ 69

The parties' initial disagreement centers upon whether a court conducting a foregone conclusion analysis should focus on (1) the compelled communication itself (i.e., the entry of the passcode) or (2) the information to be revealed by the entry of the passcode. One scholar has helpfully described these competing focuses as (1) the act that opens the door and (2) the treasure that lies beyond the door. See Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 Tex. L. Rev. 767, 777 (2019).

¶ 70

Courts are also split on this issue. Several courts have held that the proper focus of the foregone conclusion analysis is on the testimonial value of the act of producing the passcode. See *Andrews*, 234 A.3d at 1273 ("[W]e find that the foregone conclusion test applies to the production of the passcodes themselves, rather than to the phones' contents."); *Stahl*, 206 So. 3d at 136 ("[T]he relevant question is whether the State has established that it knows with particularity that the passcode exists, is within the accused's possession or control, and is authentic."); *Gelfgatt*, 11 N.E.3d at 615 ("[W]e conclude that the factual statements that would be conveyed by the defendant's act of entering an encryption key in the computers are 'foregone conclusions' and, therefore, the act of decryption is not a testimonial communication that is protected by the Fifth Amendment."); *State v. Johnson*, 576 S.W.3d 205, 227 (Mo. 2019) ("The focus of the foregone conclusion exception is the extent of the State's knowledge of the existence of the facts conveyed through the compelled act of production. Here, [defendant] was ordered to produce the passcode to his phone."); *Commonwealth v. Jones*, 117 N.E.3d 702, 710 (Mass. 2019) ("[F]or the foregone conclusion exception to apply, the Commonwealth must establish that it already knows the testimony that is implicit in the act of the required production. [Citation.] In the context of

compelled decryption, the only fact conveyed by compelling a defendant to enter the password to an encrypted electronic device is that the defendant knows the password, and can therefore access the device.”).

¶ 71 Other courts have placed the focus of the foregone conclusion analysis on the files stored on the device. See *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d at 1346 (“Nothing in the record before us reveals that the Government knows whether any files exist and are located on the hard drives ***.”); *Seo v. State*, 148 N.E.3d 952, 958 (Ind. 2020) (“This leads us to the following inquiry: has the State shown that (1) [defendant] knows the password for her iPhone; (2) the files on the device exist; and (3) she possessed those files?”); *G.A.Q.L.*, 257 So. 3d at 1063 (“It is not the verbal recitation of a passcode, but rather the documents, electronic or otherwise, hidden by an electronic wall that are the focus of this exception.”).

¶ 72 (b) *People v. Spicer*: Focus on the Contents of the Phone

¶ 73 The only Illinois court to consider the application of the foregone conclusion doctrine in the context of a motion to compel production of a cell phone passcode is *Spicer*. In *Spicer*, the defendant was pulled over for a traffic violation. *Spicer*, 2019 IL App (3d) 170814, ¶ 3. A drug dog alerted on the vehicle, and officers found a pill bottle containing cocaine inside a bag in the area where the defendant had been sitting. *Id.* ¶ 5. The police arrested the defendant for possession of a controlled substance, and the State later charged him with possession with intent to deliver. *Id.* ¶ 3. The police obtained a search warrant for a cell phone they seized from the defendant during his arrest. *Id.* ¶ 4. After the defendant declined to provide the passcode to the phone, the State filed a motion to compel its production. *Id.*

¶ 74 The Third District concluded the foregone conclusion exception did not apply

because the State did not establish with reasonable particularity “the contents of the phone.” *Id.* ¶ 21. In framing its analysis, the court noted that “Illinois courts [had] not decided whether compelling a defendant to provide his passcode is testimonial,” and acknowledged the analytical split among foreign jurisdictions on the issue. *Id.* ¶¶ 16-17. For guidance, the Third District looked to a case from the Florida District Court of Appeals, G.A.Q.L., 257 So. 3d at 1062, which examined the compelled production of an iTunes password. *Spicer*, 2019 IL App (3d) 170814, ¶ 19.

¶ 75 In G.A.Q.L., the court first determined that the compelled production of the password was testimonial because it necessitates the use of the mind. G.A.Q.L., 257 So. 3d at 1062. The court next determined that “the object of the foregone conclusion exception is not the password itself, but the data the state seeks behind the passcode wall.” *Id.* at 1063. The court then held that foregone conclusion doctrine did not apply because the State “fail[ed] to identify any specific file locations or even name particular files that it [sought] from the *** passcode-protected phone.” *Id.* at 1064. Instead, it “generally [sought] essentially all communications, data, and images on the locked iPhone” based on “the prosecutor’s statement at the hearing that the surviving passenger [of a DUI-related accident] had been communicating with [the defendant] via Snapchat and text message on the day of the accident and after the accident.” *Id.*

¶ 76 The Third District found G.A.Q.L. persuasive and held that the focus of a foregone conclusion analysis should be placed on the contents of the phone instead of the production of the passcode. *Spicer*, 2019 IL App (3d) 170814, ¶ 21.

¶ 77 In applying this analytical framework to the facts before it, the Third District concluded that the State “does not know what information might be on [the defendant’s] phone but surmises that cell phones are often used in unlawful drug distribution and such information would be available on [the defendant’s] phone.” *Id.* ¶ 22. The court noted that the search warrant

permitted the State to access “most of the information” on the defendant’s phone, and the State “[did] not identify any documents or specific information it [sought] with reasonable particularity.” *Id.*

¶ 78 We view Spicer and G.A.Q.L. as factually distinguishable. In contrast to those cases, here, the State has described with reasonable particularity the information it seeks.

¶ 79 Ummel testified he believed he would find on defendant’s phone photographs of the false paychecks and evidence of their electronic deposit. Ummel also testified he observed photographs of the false paychecks, which were payable to defendant and endorsed in defendant’s name for mobile deposit to Citibank and Varo Bank. Ummel also observed Spurling’s text message to Schlesinger, which stated that defendant deposited the checks by mobile deposit. Ummel also explained that mobile deposit involves taking a photograph of a check and sending it electronically to a financial institution.

¶ 80 Dairy Queen’s bank records confirmed that the false paychecks were deposited in this manner and the funds were missing from Dairy Queen’s accounts. In other words, Ummel described the documents and evidence he was looking for and explained why he expected it to be found on defendant’s phone.

¶ 81 In addition to viewing Spicer and G.A.Q.L. as factually distinguishable, we also do not believe—for reasons we discuss in greater detail *infra*, ¶¶ 82-95—that the Third District was correct to conclude that the focus of the foregone conclusion doctrine is properly placed on the information on the phone. On that issue, we find more persuasive the reasoning of the New Jersey Supreme Court in *Andrews*, 234 A.3d at 1273, which held that “the foregone conclusion test applies to the production of the passcodes themselves, rather than to the phones’ contents.”

¶ 82 (c) *State v. Andrews*: Focus on the Passcode

¶ 83 In Andrews, the defendant was a former sheriff's deputy who was charged with official misconduct for revealing the existence of an undercover narcotics investigation to its target. *Id.* at 1261. According to the target, the defendant also advised him to (1) remove a tracking device from his vehicle and (2) discard cell phones. *Id.* at 1259. The communications occurred largely through the iPhone FaceTime application and text messages. *Id.* at 1260. The State seized the defendant's cell phones and obtained a warrant to search them but was unable to access the phones' contents without the passcodes. *Id.* at 1261. The State moved to compel the defendant to disclose the passcodes to his two phones. *Id.*

¶ 84 In considering whether the fifth amendment protected the defendant from disclosing the passcodes to his phones, the court first examined the history of the fifth amendment privilege in the context of compelled communications, including *United States v. Doe*, 465 U.S. 605 (1984) (*Doe I*), *Fisher*, and *Hubbell*. *Andrews*, 234 A.3d at 1266-69. The court noted that these cases all involved the production of documents and gave rise to the inference that the act of production "must be considered in its own right, separate from the documents sought." *Id.* at 1269 (citing *Fisher*, 425 U.S. at 410 ("The act of producing evidence *** has communicative aspects of its own, wholly aside from the contents of the papers produced.")), *Doe I*, 465 U.S. at 612 ("Although the contents of a document may not be privileged, the act of producing the document may be."), and *Hubbell*, 530 U.S. at 40 ("The 'compelled testimony' that is relevant in this case is not to be found in the contents of the documents produced in response to the subpoena. It is, rather, the testimony inherent in the act of producing those documents.")).

¶ 85 The *Andrews* court concluded, "To be consistent with the Supreme Court case law that gave rise to the exception, we find that the foregone conclusion test applies to the production of the passcodes themselves, rather than to the phones' contents." *Andrews*, 234 A.3d at 1273.

¶ 86

(d) Our Conclusion: The Focus Is on the Passcode

¶ 87

We agree with Andrews and find further support for its conclusion in *Doe II*, in which the Supreme Court rejected “[p]etitioner’s blanket assertion that a statement is testimonial for Fifth Amendment purposes if its content can be used to obtain evidence” because it “confuses the requirement that the compelled communication be ‘testimonial’ with the separate requirement that the communication be ‘incriminating.’ ” *Doe II*, 487 U.S. at 208 n.6. As the Supreme Court observed, “If a compelled statement is not testimonial and for that reason not protected by the privilege, it cannot become so because it will lead to incriminating evidence.” (Internal quotation marks omitted.) *Id.* at 208 n.6.

¶ 88

Additionally, the *Hubbell* court noted, “Whether the constitutional privilege *** protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents themselves are incriminating.” *Hubbell*, 530 U.S. at 37.

¶ 89

Placing the focus of the foregone conclusion doctrine on the passcode rather than the documents or evidence contained on the phone appears to strike the most appropriate balance between fifth amendment concerns and fourth amendment concerns. In this case, the State’s motion seeks the compelled production of the passcode. The production of the passcode will lead to the contents of the phone, for which the State has obtained a valid search warrant that defendant does not challenge.

¶ 90

In ruling on the State’s motion to compel, the trial court addressed whether “the evidence sought for purposes of the foregone conclusion doctrine consist[s] of the pass code or the contents of the phone.” The court observed, “perhaps the better-reasoned argument is that *** the foregone conclusion exception should only apply to the pass code,” but again acknowledged its obligation, in the absence of any binding authority to the contrary, to follow the Third District’s

holding in Spicer.

¶ 91 In applying the Third District's analytical framework (placing the focus on the contents of the phone rather than the passcode), the trial court observed that, to obtain a search warrant, the State "must articulate with particularity the person and place to be searched and the person and things to be seized. But for the foregone conclusion exception to apply, the State must know—it requires knowledge, but that knowledge is qualified with reasonable particularity." This observation illustrates how the Spicer approach conflates the act of production with the contents of the phone. That is to say, it allows the fifth amendment to swallow the fourth amendment, thereby permitting a suspect to "hide" behind a passcode evidence to which the State is lawfully entitled pursuant to the issuance of the search warrant.

¶ 92 The contents of the phone are protected by the fourth amendment, and in this case, the State followed proper procedures to obtain a valid search warrant to seize that information. The testimonial value of the act of producing the passcode—a series of letters or numbers which "opens the door" to permit the State to execute that valid warrant—must be analyzed separately from the State's authority to seize the evidence on the phone. And it bears repeating that defendant does not challenge the probable cause supporting the search warrant that authorizes seizure of the contents of his phone. Instead, he seeks to utilize the fifth amendment to prevent the operation of the fourth amendment, which authorizes (as here) the issuance of a search warrant based upon a verified complaint showing probable cause for the presence of evidence of a crime in the premises (here, the cell phone) to be searched.

¶ 93 By focusing (1) the fifth amendment analysis on the production of the passcode and (2) the fourth amendment analysis on the evidence contained on the phone, one constitutional provision does not become either superior or subservient to the other. Further, doing so ensures

that the protection against compelled self-incrimination and the interests of law enforcement in executing a valid search warrant are both respected.

¶ 94 These considerations provide further support for our conclusion that the Third District in *Spicer* erroneously relied on the faulty reasoning of the G.A.Q.L. court to hold that the proper focus of a foregone conclusion analysis is on the contents of the phone instead of the production of the passcode. *Spicer*, 2019 IL App (3d) 170814, ¶ 21. The G.A.Q.L. court reasoned that the phone's contents is where the proper focus should lie because that is what the government truly seeks, not the passcode itself. G.A.Q.L., 257 So. 3d at 1062. However, as illustrated above, this reasoning conflates fourth amendment concerns with fifth amendment concerns.

¶ 95 As the *Fisher* court explained,

“We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy[,] a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against ‘compelled self-incrimination, not (the disclosure of) private information.’ ”*Fisher*, 425 U.S. at 401 (quoting *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975)).

¶ 96 We acknowledge the Illinois Supreme Court's recent decision in *People v. McCavitt*, 2021 IL 125550, ¶ 4, which addressed “a person's reasonable expectation of privacy in data on an electronic storage device that is subject to search” and “the fourth amendment's particularity requirement as applied to electronic storage devices.” However, in the case before us, defendant has not challenged the validity of the search warrant, which authorizes the State to seize the contents of his phone. *McCavitt* does not address the application of the fifth amendment where a phone that is the subject of a lawful search warrant is passcode-protected and the owner of the

phone declines to provide the passcode.

¶ 97 ii. Application of the Foregone Conclusion Doctrine to This Case

¶ 98 Applying these principles to the case before us, for the forgone conclusion doctrine to apply, the State must establish with reasonable particularity (1) it knows the passcode exists, (2) the passcode is within the defendant's possession or control, and (3) the passcode is authentic.

See Andrews, 234 A.3d at 1274-75; Stahl, 206 So. 3d at 136.

¶ 99 Ummel testified that (1) the phone is locked by a security passcode, (2) defendant has not provided him with the passcode, and (3) Ummel does not have the technology to "crack" the passcode. This evidence establishes with reasonable particularity that a passcode for the phone exists.

¶ 100 Ummel further testified that one phone was retrieved from defendant and another was retrieved from Spurling. Defendant provided his phone number on a jail form when bonding out. When Ummel dialed that phone number, the phone Ummel identified as belonging to defendant in the complaint for search warrant would ring. This evidence establishes with reasonable particularity that defendant has had possession or control of the phone and, accordingly, has possession or control of the passcode required to access and utilize the phone.

¶ 101 Last, the courts in Andrews and Stahl addressed the authenticity element in the context of a cell phone passcode, noting that a passcode is self-authenticating. Stahl, 206 So. 3d at 136; Andrews, 234 A.3d at 1275. That is, if the passcode provides entry to the phone, the passcode is authentic. Stahl, 206 So. 3d at 136; Andrews, 234 A.3d at 1275. Therefore, the authenticity element will be determined when the passcode is entered into the phone.

¶ 102 Accordingly, the State has shown with reasonable particularity that the passcode exists and is within defendant's possession or control. The passcode will self-authenticate if it

unlocks the phone. As such, the foregone conclusion doctrine is satisfied, rendering the act of producing the passcode non-testimonial and outside the protection of the fifth amendment privilege against self-incrimination.

¶ 103 Even applying Spicer's analytical framework to the facts of this case, the foregone conclusion doctrine applies because, as discussed *supra*, ¶¶ 78-80, the State has also established with reasonable particularity the "contents of the phone."

¶ 104 c. Evidence of the Act of Production at Trial

¶ 105 At the hearing on the motion to compel, and in its brief before this court, the State represented that it would not use at trial evidence of defendant's act of production of the passcode. The State explained that it "doesn't need an intricate pass code to prove ownership of the phone or its contents." That is precisely the point of the foregone conclusion doctrine; the testimony implied by the act of producing the passcode—i.e., the defendant has knowledge of the passcode—"adds little or nothing to the sum total of the Government's information." *Fisher*, 425 U.S. at 411.

¶ 106 We agree with the State that the defendant's knowledge of the phone's passcode and his knowledge of the phone's contents are two different things. Because of the commitment the State has made to the trial court—namely, that it will not use evidence of defendant's act of production at trial—the State will be required to prove defendant's knowledge of the phone's contents through other means. And on remand, the State's commitment is enforceable by the trial court.

¶ 107 III. CONCLUSION

¶ 108 For the reasons stated, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

¶ 109 Reversed and remanded.

Cite as: **People v. Sneed, 2021 IL App (4th) 210180**

Decision Under Review: **Appeal from the Circuit Court of De Witt County, No. 21-CF-13; the Hon. Karle E. Koritz, Judge, presiding.**

Attorneys for Appellant: **Daniel Markwell, State's Attorney, of Clinton (Patrick Delfino, David J. Robinson, David E. Mannchen, and James C. Majors, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.**

Attorneys for Appellee: **James E. Chadd, Catherine K. Hart, and Joshua Scanlon, of State Appellate Defender's Office, of Springfield, for appellee.**

APPENDIX C

FILED

DeWitt County, Illinois

MAY 12 2021

Minette Van Valen
Clerk of the Circuit Court

1 STATE OF ILLINOIS

2 IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

3 COUNTY OF DEWITT

4 PEOPLE OF THE STATE OF)
5 ILLINOIS,)
6 vs.) 21 CF 13
7 KEIRON K. SNEED,)
8 DEFENDANT.)

10

11

12 CONTINUED HEARING ON MOTION TO COMPEL PRODUCTION OF
CELLULAR PHONE PASS CODE

13

14 REPORT OF PROCEEDINGS had in the above-entitled cause on
15 the 24th day of March, 2021, before the
16 HONORABLE KARLE E. KORITZ, Circuit Judge.

17

18 APPEARANCES

19 MR. LARS DUNN, MR. TIMOTHY HOLL,
20 Asst. State's Attorney, Public Defender,
appearing on behalf of appearing on behalf of
the People. the Defendant.

21

22

23 Tammy J. Greenfield, CSR
License #084-004214

24

INDEX OF PROCEEDINGS

ARGUMENTS:

By Mr. Dunn: Page 3, 16
By Mr. Holl: Page 13

RULING:

By the Court: Page 17

1 RULING

2 BY THE COURT:

3 This isn't the first time that I've been confronted
4 with the issue of the production to compel a pass code for
5 a cellular phone, although this is the first time that this
6 issue has been addressed in DeWitt County since the passing
7 of Spicer, the Third District case from 2019.

8 The Fifth Amendment does not prohibit the compelled
9 production of every sort of incriminating evidence. It
10 applies only when the accused is compelled to make a
11 testimonial communication that is incriminating, and that's
12 the Fisher case, the seminal case for addressing all of
13 these issues surrounding pass codes and safe deposit keys
14 and things of that nature.

15 An act of production is testimonial when the
16 government compels the defendant to make extensive use of
17 the contents of his own mind to communicate a statement of
18 fact. Some courts have held that disclosing a pass code is
19 not testimonial as it falls under the foregone conclusion
20 exception and is not protected by the Fifth Amendment
21 privilege. Even without addressing the foregone conclusion
22 exception, some courts have held that the production -- the
23 compelling production -- of the pass code is not
24 testimonial.

1 The testimonial nature of revealing the pass code
2 is diminished under the facts of this case in the GAQL case
3 cited by Spicer. The court was concerned about the implied
4 factual statements present by disclosure of the pass code
5 in demonstration that defendant was required to use his
6 mind to access the phone. Those implied statements would
7 seemingly include that the phone belonged to the defendant
8 and that he was capable of accessing it.

9 The testimonial nature of these implied factual
10 statements are mitigated here by the fact that the phone
11 was found on the Defendant and that the Defendant listed
12 the phone number associated with the phone as his own phone
13 number on the bond sheet. The fact that he knows the pass
14 code does not provide any further evidence against him that
15 already exists in this -- under these facts, it's no
16 different than compelling a Defendant to disclose a key to
17 a storage unit or a lockbox or something of that nature.

18 Here, disclosing the pass code would not seem to
19 make extensive use of the contents of the Defendant's mind,
20 and the implied statement of fact communicated by
21 disclosure of the pass code provides no further evidence
22 than already exists. As Mr. Dunn indicated, the State's
23 not going to introduce the pass code itself at trial.

24 Certainly an objective, reasonable judge could

1 reach the conclusion that the production of the pass code
2 is not testimonial. But that's not a conclusion for this
3 Court to reach when Illinois has already addressed that
4 issue and the appellate court has already addressed that
5 issue, and there's no split in authority among appellate
6 courts because the only case comes out of the Third
7 District. It could be the Fourth District reaches a
8 different conclusion, but the Fourth District hasn't
9 addressed this particular fact yet. The Supreme Court of
10 Illinois has not addressed this particular fact yet.

11 And so I might interpret Fisher and Hubbell a
12 different way. Certainly Mr. Dunn might interpret Fisher
13 and Hubbell a different way. But where that foregone
14 conclusion or the -- I should say in this case the --
15 testimonial nature of pass code has already been
16 interpreted by the Illinois Appellate Court, this Court is
17 obligated to follow that precedent. And Spicer makes clear
18 that such disclosure would be testimonial.

19 Mr. Dunn has argued the foregone conclusion, and an
20 exception to the prohibition of a compelled production of
21 incriminating testimonial evidence exists where the
22 existence, location and authenticity of the evidence is a
23 foregone conclusion that adds little or nothing to the sum
24 total of the State's information. Again, that's the Fisher

1 case.

2 For the foregone conclusion exception to apply, the
3 State must know with reasonable particularity that when it
4 sought the act of production the State knew the evidence
5 existed, that the evidence was in the Defendant's
6 possession and that it was authentic. And this begs the
7 question does the evidence sought for purposes of the
8 foregone conclusion doctrine consist of the pass code or
9 the contents of the phone.

10 Again, perhaps the better-reasoned argument is that
11 of the State that the foregone conclusion exception should
12 only apply to the pass code, but that's not what Spicer
13 held -- or I should say that Spicer held that the proper
14 focus is not on the pass code but on the information the
15 pass code protects, which, in this case, would be the
16 contents of the cell phone, as was true in the facts under
17 Spicer.

18 Spicer reached the opposite conclusion -- Spicer
19 reached the opposite conclusion than that argued by the
20 State, and perhaps that this Court might find otherwise,
21 but Spicer is the law and this Court is obligated to follow
22 Spicer.

23 There was a search warrant issued in this case.
24 And search warrants are Fourth Amendment creatures and a

1 search warrant is required to state with particularity the
2 person and place to be searched and the person and things
3 to be seized. And the State is required to articulate in
4 the Complaint for a Search Warrant with particularity the
5 person and place to be searched and the person and things
6 to be seized.

7 A search warrant for the phone contents has been
8 issued in this case. The Defendant doesn't challenge
9 probable cause for the issuance of a search warrant or the
10 search warrant itself. Certainly law enforcement has a
11 right to possess the contents of the cell phone. But,
12 again, the courts have viewed that distinction between the
13 Fourth Amendment right -- or the Fourth Amendment focus --
14 for search warrants versus the Fifth Amendment focus for
15 compelled production of a pass code. And Spicer's clear
16 that the foregone conclusion exception is a higher
17 threshold than probable cause for a search warrant.

18 Again, for a search warrant, it must articulate
19 with particularity the person and place to be searched and
20 the person and things to be seized. But for the foregone
21 conclusion exception to apply, the State must know -- it
22 requires knowledge, but that knowledge is qualified with
23 reasonable particularity. The State must know with
24 reasonable particularity that when it sought the act of

1 production the State knew the evidence existed, the
2 evidence was in the Defendant's possession and it was
3 authentic.

4 Looking at the testimony before the Court here
5 today, yesterday, the Defendant's phone has not been linked
6 to the electronic transaction in question. The only
7 evidence linking the Defendant's phone, rather than the
8 Co-Defendant's phone to the electronic transaction, are the
9 statements of the Co-Defendant. The only evidence of the
10 Defendant's involvement are the statements of the
11 Co-Defendant. The only evidence -- the Co-Defendant's
12 phone, rather. The Co-Defendant's phone has not been
13 accessed or searched. A comparison of the Defendant's
14 signature has not been made. Digital records from the bank
15 or the mobile service provider have not been subpoenaed.
16 And it would be speculation to assume that a photo of the
17 check would remain on the phone after the electronic
18 transaction.

19 Certainly it's reasonable to reach the opposite
20 conclusion that perhaps the mobile application used to
21 complete the electronic transaction would simply scan the
22 check itself, like some applications scan a bar code -- I
23 don't know, that hasn't been presented to the Court -- and
24 that that information will be sent to the bank without

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. -

1 saving it on the phone. It would make sense. I haven't
2 heard in detail how those operations work.

3 It would make sense that there was some protection
4 through that app and through that process such that the
5 photo itself of the check with the routing number and the
6 account number wouldn't remain on the phone for any period
7 of time. I don't know. But that's the point. I don't, I
8 don't know. It would be speculation for me to presume at
9 this point that that photograph would still be on the
10 phone.

11 I don't believe this is a mere fishing expedition.
12 I, I think what law enforcement is trying to achieve is not
13 a, is not a fishing expedition at all. Nevertheless, the
14 State's particular knowledge of the existence of the
15 evidence or, more to the point here, the Defendant's
16 possession of the evidence sought on that phone, doesn't
17 meet the threshold for the foregone conclusion exception.
18 The State may have demonstrated particular knowledge that
19 the evidence will be found on either the Defendant or the
20 Co-Defendant's phone, but I can't find here that it's more
21 likely to be found on the Defendant's phone any more than
22 it might be on the Co-Defendant's phone. And so under the
23 facts of this case, I don't believe that the State has
24 shown with reasonable particularity that it knew that the

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. -

1 evidence existed, that the evidence was in the Defendant's
2 possession and that it was authentic. And so at this point
3 the State's Motion to Compel Production of Pass Code is
4 denied.

5 With respect to scheduling, counsel?

6 MR. DUNN: Put it on the pretrial, your
7 Honor.

8 THE COURT: Cause set for jury trial May
9 17 at 9 a.m., pretrial April 22 at 10:30 a.m. Mr. Holl to
10 give notice to the Defendant.

11 The Court also calls 21 CM 15. Are you asking for
12 the same scheduling, Mr. Holl?

13 MR. HOLL: Yes, your Honor.

14 THE COURT: 21 CM 15 set for jury trial
15 May 17 at 9, pretrial April 22 at 10:30. Again, Mr. Holl
16 to give notice to the Defendant.

17 Anything further, counsel?

18 MR. DUNN: No, your Honor.

19 MR. HOLL: No, your Honor.

20 (WHEREUPON, the proceedings
21 were adjourned.)

22

23

24

APPENDIX D

FILED
DeWitt County, Illinois

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
COUNTY OF DEWITT

MAR 01 2021

Michele Van Vliet
Clerk of the Circuit Court

21-MR-8

COMPLAINT FOR SEARCH WARRANT

FILED

A. Complainant: Detective Todd Ummel
Clinton Police
DeWitt County, Illinois

JUL 19 2021

CARLA BENDER
Clerk of the

Appellate Court, 4th District

B. Place or Objects to be searched:

- Cellular phone belonging to Kerion Sneed, a Samsung Galaxy A01, currently in the custody of Clinton Police
- Cellular phone belonging to Allora Spurling Sneed, a Samsung Galaxy J2, currently in the custody of Clinton Police

C. Items or Materials to be seized:

- Any and all evidence related to the forging and transmission of paychecks drawn upon the State Bank of Lincoln from the account of Dairy Queen in Clinton, Illinois, as well as any other forged checks to include:
 - Photographs and records of paychecks from Dairy Queen
 - Records of messages sent from the phones of Kerion Sneed and Allora Spurling Sneed pertaining to the forged paychecks from text messaging applications or other messaging applications such as Facebook, WhatsApp, etc.
 - Confirmations of deposits from Citi Bank, Varo Bank, and any other banks
 - E-mails, messages, and application notifications pertaining to the deposit of checks

D. Applicant has probable cause to believe said items or materials are located on, at, or within the place or object to be searched based on the information contained within this petition.

On January 5, 2021 Clinton Police Officer Alex Lovell was contacted by Sara Schlesinger, bookkeeper for Dairy Queen in Clinton, Illinois. Schlesinger came across a paycheck for a Kerion Sneed in the amount of \$274.33, who is not an employee of Dairy Queen. Kerion Sneed's wife, Allora Spurling Sneed, was at the time an employee of Dairy Queen. The paycheck had been cashed via mobile deposit, a way of depositing checks using cellular phones, with Citibank.

Schlesinger then supplied Officer Lovell with text messages between herself and Allora Spurling Sneed. In those messages Allora Spurling Sneed admitted to knowledge of a forged paycheck but claimed "I didn't know anything about it. I guess it wasn't meant to happen for real. It [sic] was being curious and he didn't think it would actually work cuz it wasn't real. He never got the money. Idk I'm upset and embarrassed. And pissed. But please know I had no clue about it[.] He doesn't have a card for that bank or anything. Is there a way to call the bank and get the money back cuz he didn't get it[.]"

Schlesinger confirmed that the amount on the paycheck was drawn upon Dairy Queen's account from that same check. The information provided to Schlesinger was turned over to

Detective Todd Ummel. Detective Ummel attempted to schedule an interview with Allora Spurling Sneed to clarify her statements made to Schlesinger. Ummel made in person contact with Allora Spurling Sneed on January 6, 2021. She agreed to meet with Detective Ummel at the Clinton Police Station on January 7, 2021. She did not attend the meeting, claiming COVID exposure. The meeting was rescheduled for January 11, 2021. Allora Spurling Sneed did not attend this meeting, either. Additional attempts to contact her have been unsuccessful.

On February 8, 2021, Schlesinger provided an additional forged paycheck made payable to Kerion Sneed in the amount of \$423.22. This amount was drawn from Dairy Queen's account at State Bank of Lincoln via mobile deposit. The amount was to be deposited to Varo Bank according to the endorsement on the back. Due to the use of a mobile device to effectuate deposit Clinton Police is seeking to search Kerion Sneed's phone to confirm whom deposited the forged paycheck and to determine if any additional forged paychecks have been deposited. Clinton Police also seek to confirm that the text messages from Allora Spurling Sneed came from her phone.


Petitioner Detective Todd Ummel

Subscribed and sworn to before me this 1st day of March of 2021 at 11:45 P.M. A.M.


Associate Circuit Judge

MAR 01 2021

Minette Van Valen
Clerk of the Circuit Court

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
COUNTY OF DEWITT

21-MR-8

SEARCH WARRANT

TO ALL PEACE OFFICERS OF THE STATE:

On this date being March 1, 2021 petitioner Todd Ummel has subscribed and sworn to a Complaint for Search Warrant before me. Upon examination of said Complaint, I find it states facts sufficient to establish probable cause for the issuance of a warrant to search the following described place, persons or objects for the items listed.

I, THEREFORE, COMMAND THAT YOU SEARCH:

- Cellular phone belonging to Kerion Sneed, a Samsung Galaxy A0, currently in the custody of Clinton Police
- Cellular phone belonging to Allora Spurling Sneed, a Samsung Galaxy J2, currently in the custody of Clinton Police

AND, IF FOUND, SEIZE THE FOLLOWING:

- Any and all evidence related to the forging and transmission of paychecks drawn upon the State Bank of Lincoln from the account of Dairy Queen in Clinton, Illinois, as well as any other forged checks to include:
 - Photographs and records of paychecks from Dairy Queen
 - Records of messages sent from the phones of Kerion Sneed and Allora Spurling Sneed pertaining to the forged paychecks from text messaging applications or other messaging applications such as Facebook, WhatsApp, etc.
 - Confirmations of deposits from Citi Bank, Varo Bank, and any other banks
 - E-mails, messages, and application notifications pertaining to the deposit of checks

ISSUED this 1st day March of 2021 at 11:45 P.M./A.M.


Associate Circuit Judge

APPENDIX E

FILED
DeWitt County, Illinois

MAR 05 2021

Michelle Van Valen
Clerk of the Circuit Court

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff,)
)
vs.) Case No.: 21-CF-13
)
KEIRON K. SNEED,)
Defendant.)

MOTION TO COMPEL PRODUCTION OF CELLULAR PHONE PASSCODE

NOW COME the People of the State of Illinois, by Lars Dunn, Assistant State's Attorney of DeWitt County, Illinois, and moves this Court to compel the entry of a passcode into a cellular device, and in support thereof states as follows:

FACTS

1. Upon arrest, Defendant bonded out and provided his phone number on the Bail Bond form maintained by the DeWitt County Jail and in the Court's file.
2. The number on the bond sheet matches the phone the State seeks to search in this cause.
3. During its investigation, Clinton Police were provided with evidence that a forged check was submitted via mobile deposit from Defendant to a financial institution.
4. The police were also provided with a copy of a text message from co-defendant's phone admitting to elements of the offense of forgery.
5. Clinton Police Detective Ummel obtained a search warrant from the Honorable Judge Koritz to search Defendant Keiron Sneed's phone as well as co-defendant Allora Spurling Sneed's phone.
6. Both phones are protected by a password, preventing law enforcement from searching

the phones pursuant to the issued search warrant.

LAW

7. Upon a showing of materiality, and if the request is reasonable, a court may require disclosure of information to the State. IL SUP. CT. R. 413(e).
8. The Fifth Amendment of the United States Constitution protects against citizens from self-incrimination. U.S. CONST. AMEND. V.
9. The Fifth Amendment of the United States Constitution applies to the States through the Fourteenth Amendment. U.S. CONST. AMEND. XIV; Malloy v. Hogan, 378 U.S. 1, 6 (1964).
10. A similar self-incrimination provision exists in the Illinois Constitution. IL CONST. 1970, art. I § 10.
11. The privilege against self-incrimination protects the accused from having to testify against herself, or to provide the State with evidence of a testimonial or communicative nature. Schmerber v. California, 384 U.S. 757, 760 (1966); People ex rel. Bowman v. Woodward, 63 Ill.2d 382, 386 (1976); People v. Beyah, 102 Ill. App.3d 434, 436 (1st Dist. 1981).
12. To be protected by the Fifth Amendment, a communication must be testimonial, incriminating, and compelled. Hiibel v. Sixth Jud. Dist. of Nev., Humboldt Co., 542 U.S. 177, 189 (2004).
13. There is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating. United States v. Hubbell, 530 U.S. 27, 34-35 (2000).
14. An act of production compelled by the government is testimonial if the individual must

extensively use his own mind or implicitly communicate some statement of fact.

Hubbell, 530 U.S. at 43; Com. v. Gelfgatt, 468 Mass. 512, 520 (2014).

15. The question of whether a compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particular case. Doe v. U.S., 487 U.S. 201, 214-15 (1988)(citing Fisher v. United States, 425 U.S. 391, 410 (1976)).
16. The Supreme Court has held that the Fifth Amendment privilege does not protect a suspect from being compelled by the State to produce “real or physical evidence.” Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990).
17. An Act of production is insufficient to invoke the privilege against self-incrimination where the facts conveyed are already known to the government, and the individual compelled adds little or nothing to the sum total of the government’s information. Fisher, 425 U.S. at 411.
18. An exception to the Fifth Amendment privilege exists, called the forgone conclusion exception. Fisher, 425 U.S. at 411.
19. When this exception applies, the question is not one of testimony but of surrender. Fisher, 425 U.S. at 411 (citing In re Harris, 221 U.S. 274, 279 (1911)).
20. Surrender pertains to releasing property one is no longer entitled to keep. Harris, 221 U.S. at 279.
21. The mere fact that something exists or that they are possessed by an individual does not in and of itself pose any realistic threat of incrimination. Fisher, 425 U.S. at 412.
22. For the forgone conclusion exception to apply the State must establish the existence of the evidence demanded, the possession of that evidence by the defendant, and the

authenticity of the evidence. Fisher, 425 U.S. at 410-13; Hubbell, 530 U.S. at 36; State v. Stahl, 206 So.3d 124, 133 (Fla. 2nd Dist. Ct. App. 2016).

23. When the elements of the forgone conclusion exception are met, the Fifth Amendment does not protect the act of production, and no Constitutional rights are touched. Fisher, 425 U.S. at 411; Thomas A. Drysdale, *I Can't Quite Put My Finger On It*, 108 Ill. B.J. 26 (2020).

24. Passcodes to cellular phones have been previously held to be not protected by Fifth Amendment privilege in other jurisdictions. *See, e.g.*, State v. Stahl, 206 So.3d 124 (Fla. 2nd Dist. Ct. App. 2016); Commonwealth v. Gelfgatt, 468 Mass. 512 (2014); United States v. Robinson, 76 M.J. 663 (U.S. Air Force Ct. App. 2017).

25. Courts have been split on whether the passcode or the information on the phone is the testimonial communication, with some ruling the passcode should be the focus of the analysis. *See, e.g.*, State v. Stahl, 206 So.3d 124, 133 (Fla. 2nd Dist. Ct. App. 2016); Commonwealth v. Jones, 481 Mass. 540 (2019).

26. Other courts have ruled that the information contained on the phone should be the focus of the analysis. People v. Spicer, 430 Ill. Dec. 268 (3rd Dist. 2019).

27. The only court of binding authority in Illinois to apply the forgone conclusion exception to phone passcode production is the court in *Spicer*. People v. Spicer, 430 Ill. Dec. 268 (3rd Dist. 2019).

28. In Illinois the State must provide reasonable particularity concerning the information it is seeking. Spicer, 430 Ill. Dec. at 273.

29. Reasonable particularity has been held by federal courts to be “some knowledge that files do exist on the encrypted devices.” U.S. v. Apple MacPro Computer, 851 F.3d

238, 248 (3rd Cir. 2017).

30. It is not necessary to identify exactly the evidence the Government is seeking. In re Grand Jury Subpoena, 670 F.3d 1335, 1347 (11th Cir. 2012)(citing Hubbell, 530 U.S. at 45); Apple MacPro Computer, 851 F.3d at 248.
31. The Fifth Amendment's privilege does not permit noncompliance with a search warrant. State v. Andrews, 234 A.3d 1254, 1263 (N.J. Sup. Ct. 2020).
32. With a valid search warrant, the State is permitted to access a phone's contents, as limited by the trial court's order, in the same way that the State may search a home, vehicle, or other place that is the subject of a search warrant. Andrews, 234 A.3d at 1264.
33. The court may grant the State broad authority in executing a search warrant, including the destruction of property and forcible entry into a residence. Andrews, 234 A.3d at 1264 (citing United States v. Ramirez, 523 U.S. 65, 69-71 (1998); United States v. Banks, 540 U.S. 31, 33, 40 (2003)).
34. Passcodes are a series of characters without independent evidentiary significance and are therefore of minimal testimonial value. Andrews, 234 A.3d at 1274 (citing Apple MacPro, 851 F.3d at 248 n.7).
35. Courts are split on the evidentiary standard to use in determining if an individual knows a password to decrypt an electronic device. *See State v. Pittman*, 367 Or. 498 (2021).
36. A court is vested with inherent power to enforce its orders. *See, e.g., Smithberg v. Illinois Mun. Retirement Fund*, 192 Ill.2d 291 (2000); People v. Warren, 173 Ill.2d 348 (1996).

ARGUMENT

37. The relevant Supreme Court cases on the foregone conclusion exception make a distinction between the act of production and the documents to be produced. *See Andrews*, 234 A.3d at 1273-74.
38. The State has satisfied the foregone conclusion exception by establishing whom the phone belongs to beyond dispute and the information that is on the phone.
39. The Court in *State v. Andrews* applied the correct reasoning and analysis of all the law, particularly binding Supreme Court precedent, in light of the division of authorities.
40. Even if this Court follows the incorrect logic of the Third District in *Spicer*, the State has met those requirements by identifying with reasonable particularity the contents of the phone.
41. Providing a passcode is not incriminating given that the State has otherwise identified ownership of the phone, making the passcode an otherwise meaningless string of numbers with no incriminating value in the State's case, therefore the act of production is not protected by the Fifth Amendment.
42. The passcode adds little or nothing to the sum total of the State's information, given that ownership of the phone is a foregone conclusion and unlocking the phone will not reveal the workings of the defendant's mind.
43. The contents of the phone are not protected, as the right to access those has already passed a probable cause determination by this court.
44. The Fifth Amendment privilege does not protect Defendant from being compelled to produce evidence if he is not testifying against himself.
45. The Fifth Amendment should not provide greater protections to individuals who

THE PEOPLE OF THE STATE OF ILLINOIS

Date: 3-5-21

By: Lars Dunn

Lars Dunn
DeWitt County Assistant State's Attorney

passcode protect their phones with letter and number combinations than to individuals who use their fingerprint as the passcode. State v. Stahl, 206 So.3d 124, 135 (Fla. 2nd Dist. Ct. App. 2016).

46. Focusing on the contents of the phone is the incorrect analysis given that the court has previously determined the State may have access to the contents of the phone, and Supreme Court precedent in *Hubbell* states that the focus is on the production.
47. Even accepting the *Spicer* court's flawed logic and denial of the motion because the State sought essentially a fishing expedition based upon the phone being in proximity to a drug crime, in the case at bar the State is able to identify evidence sought, which would have satisfied the *Spicer* court.
48. Because the forgone conclusion exception has been met, there is no Constitutional issue.
49. The State, regardless of the evidentiary standard the court adopts, has shown beyond dispute that Sneed knows the passcode to his phone as evidenced by his possession of the phone and by placing the number of his phone on the bail bond sheet.
50. Providing the passcode to the phone does not acknowledge the phone contains evidence of a crime.

WHEREFORE, the People move this Court to issue an order compelling Defendant Sneed to provide the passcode or enter the passcode to his phone seized by Clinton Police.

Respectfully submitted,



APPENDIX F

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
DEWITT COUNTY, ILLINOIS

FILED
DeWitt County, Illinois

MAR 17 2021

Michelle Van Valey
Clerk of the Circuit Court

THE PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff,)
)
v.) No. 2021-CF-13
)
KEIRON K. SNEED,)
Defendant.)

**DEFENDANT'S RESPONSE TO STATE'S MOTION TO COMPEL PRODUCTION OF
CELLULAR PHONE PASSCODE**

NOW COMES the Defendant, Keiron K. Sneed, through his attorney, Timothy Holl, who responds to the State's Motion to Compel Production of Cellular Phone Passcode as follows:

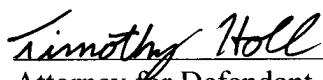
1. The State seeks compelled production of the Defendant's cellphone password.
2. The State's Motion does not state, with any specificity, what information will be found on the Defendant's phone if the password is produced.
3. The State's complaint for search warrant in 2021-MR-8 only speculates as to what files might be found on the Defendant's phone.
4. The Defendant objects to the State's request for compelled production of his cellphone password under the protections afforded to him by the Fifth Amendment to the United States Constitution.
5. The Fifth Amendment provides protection against self-incrimination by stating: “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V.
6. The Supreme Court of the United States has held that the Fifth Amendment privilege against self-incrimination protects an individual from being compelled to provide the State with evidence of a testimonial nature. Pennsylvania v. Muniz, 496 U.S. 582, 588-89 (1990) (citations omitted).
7. Additionally, the Supreme Court has held that evidence is testimonial if it forces the accused to “disclose the contents of his own mind.” Doe v. United States (Doe II), 487 U.S. 201, 211 (1988) (quoting Curcio v. United States, 354 U.S. 118, 128 (1957)).

8. The Doe II, the Supreme Court went on to state “the privilege ‘protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution *or could lead to other evidence that might be used.*’” Id. (quoting Kastigar v. United States, 406 U.S. 441, 445 (1972) (emphasis added)).
9. The Supreme Court has created a narrow “foregone conclusion” exception to the general principle that compelled disclosure of testimonial evidence violated the Fifth Amendment’s protections against self-incrimination. United States v. Fisher, 425 U.S. 391 (1976).
10. The “foregone conclusion” exception states that the act of producing evidence will not violate the Fifth Amendment protection against self-incrimination if the evidence’s existence is a foregone conclusion. Id. at 411.
11. Numerous courts have held that compelled disclosure of a cellphone password is testimonial but for the foregone conclusion exception. Commonwealth v. Davis, 220 A.3d 534 (PA 2018); Seo v. State, 148 N.E.3d 952 (IN 2020); State v. Andrews, 234 A.3d 1254 (NJ 2020).
12. There is a nation-wide split of authority regarding (1) whether the foregone conclusion exception applies at all to a request to compel a password, and (2) if the foregone conclusion exception does apply, whether the focus is on the password itself or the files protected by the password. Davis, 220 A.3d at 548 (foregone conclusion does not apply to request for compelled disclosure of computer password); Andrews, 234 A.3d at 1275 (foregone conclusion does apply and the focus is on whether the State can show the password exists, the defendant knows the password, and the password can be authenticated); and People v. Spicer, 2019 IL App (3d) 170814, ¶22 (foregone conclusion does apply but the focus is on whether the State knows what information is on the device protected by the password).
13. The only binding precedent regarding this issue for this Court is Spicer, a decision from the Third District of the Appellate Court of Illinois.
14. In Spicer, the State sought to compel the defendant to provide the password to his cellphone because they believed it would contain information regarding the distribution of drugs. Id. at ¶4.
15. The Appellate Court affirmed the trial court’s denial of the State’s request, ruling that the State did not meet the requirements of the foregone conclusion exception because the State could now show that they knew what information might be found on the defendant’s phone. Id. at ¶22.

16. Specifically, the Spicer Court stated “[i]t is ‘not enough for the state to infer that evidence exists—it must identify what evidence lies beyond the passcode wall with reasonable particularity.’” Id. at ¶20 (quoting G.A.Q.L. v. State, 257 So.3d 1058, 1063 (Fla. Dist. Ct. App., Oct. 24, 2018)).
17. Applying the same standard to the case *sub judice*, the State has not identified what evidence lies beyond the passcode wall; they have merely speculated as to what they think might lie behind the passcode wall. The existence of the evidence that the State seeks is not a foregone conclusion, making compelled disclosure of the passcode testimonial and a violation of the Fifth Amendment protection against self-incrimination.

WHEREFORE, the defendant objects to the State’s Motion to Compel Production of Cellular Phone Passcode and prays that this Honorable Court enter an order denying said Motion.

Respectfully submitted,



Attorney for Defendant

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