FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4572

MATTHEW TYLER POLLARD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Petition for Writ of Prohibition—Original Jurisdiction.

December 23, 2019

ON MOTION FOR REHEARING AND CERTIFICATION

MAKAR, J.,

The State has filed a motion for rehearing and certification, which we grant in part by certifying the following questions of great public importance:

> WHAT IS THE PROPER LEGAL INQUIRY WHEN THE STATE SEEKS TO COMPEL A SUSPECT TO PROVIDE A PASSWORD TO THE SUSPECT'S CELLPHONE IF THE SUSPECT HAS NOT PREVIOUSLY GIVEN UP HIS FIFTH AMENDMENT PRIVILEGE IN THE PASSWORD? WHAT LEGAL STANDARD APPLIES IN DETERMINING WHETHER THE FOREGONE CONCLUSION APPLIES TO COMPELLED PRODUCTION OF PASSWORDS IN THESE SITUATIONS?

The State's motion for rehearing is narrow and limited solely to our jurisdiction in this case and seeks no substantive changes on the merits of the constitutional issue. Concluding that jurisdiction exists, we deny the motion.

The State's motion for certification of conflict does not ask for any substantive changes to our opinion either. It urges, instead, that our opinion conflicts with the decision in *State v. Stahl*, 206 So. 3d 124 (Fla. 2d DCA 2016), because it adopted the approach in *G.A.Q.L. v. State*, 257 So. 3d 1058, 1062 (Fla. 4th DCA 2018), a case that disagreed with *Stahl* but neither certified conflict nor a question of great public importance. Certification presents a close question, but the factual differences in those cases and this case, such as whether a defendant has given up his testimonial privilege, make them distinguishable such that no *direct* conflict exists within the meaning of article V, section 3(b)(4), Florida Constitution. We therefore deny the motion for certification of conflict. That said, the proper approach to analyzing compelled password production needs clarification, which is why a question of great public importance has been certified.

Despite the narrow focus of the State's motion, our dissenting colleague presents many pages of arguments—old and new—that amount to a second opinion on the merits. Tellingly, our colleague's almost exclusive focus is on the Fourth Amendment and probable cause despite *no party mentioning either of them* in their merits briefs and the State advancing no argument on such matters in its motion for rehearing and certification. And whether the probable cause affidavit (which sought to seize broad categories of information from the cellphone—without identifying any specific item—on the basis that criminals use cellphones) was proper or a fishing expedition matters not; we fail to see how the issuance of a subpoena or warrant—whether careful drawn or a fishing expedition—negates the Fifth Amendment's protections, which are the focus of this case.

If anything, the relationship that exists between the Fifth Amendment right against compelled personal disclosures and its neighboring and complementary Fourth Amendment right against unreasonable searches and seizures counsels in favor of protection

against governmental overreach into individual autonomy in criminal cases. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 431 (1968) ("With good reason the Bill of Rights showed a preoccupation with the subject of criminal justice. The framers understood that without fair and regularized procedures to protect the criminally accused, there could be no liberty."). As expressed in our original opinion, the expansion of governmental powers to compel disclosures of personally-held information to search person's homes and personal effects, as reflected in *Stahl* and our dissenting colleague's view, is the antipode of the original understanding of the Fifth Amendment, which protected individual freedom by prohibiting compelled disclosures used to incriminate an accused. *See* Donald Dripps, *Self-Incrimination*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 437-439 (David F. Forte & Matthew Spalding eds., 2d ed. 2014); *see also* LEVY, at 432 ("Above all, the Fifth Amendment reflected [the framers'] judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, *in which the accused made no unwilling contribution to his conviction*, was more important than punishing the guilty.") (emphasis added). At its core, the debate in *Stahl*, *G.A.Q.L.*, and this case is about which vision of the right against compelled testimony prevails: those of the Founders who erred on the side of personal liberty or those who defend state powers to extract testimony and see no problem in "merely compel[ling a defendant] to unlock [a] phone by entering the passcode himself."

JAY, J., concurs; WINOKUR, J., concurs in part and dissents in part with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

WINOKUR, J., concurring in part and dissenting in part.

I concur in the Court's decision to certify questions of great public importance to the Florida Supreme Court. I believe that it is appropriate to add some additional insight into why this question is important enough to merit certification. I also concur in the decision to deny rehearing. However, I dissent from the decision to deny certification of conflict with *State v. Stahl*, 206 So. 3d 124 (Fla. 2d DCA 2016).

Great Public Importance

I find that the State's motion reveals that one of the central issues in this case is the contention that the State's attempt to access data on Pollard's phone "amount[s] to a mere fishing expedition." *Pollard v. State*, 44 Fla. L. Weekly D1573, D1576 (Fla. 1st DCA June 20, 2019) (citing *G.A.Q.L. v. State*, 257 So. 3d 1058, 1064 (Fla. 4th DCA 2018)). The use of this phrase suggests that the State had nothing but sheer hope that the phone contained evidence of a crime. But if this were true, the State could not have obtained a warrant to seize and search the phone. In order to obtain the search warrant, police had to demonstrate to a magistrate that it had probable cause to believe that the phone contained evidence of a crime; that is, that there was a "reasonable probability that contraband will be found" on the phone. *Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002). The State met this standard by introducing evidence—including a co-defendant's admission that the robbery Pollard allegedly participated in was planned via text message—indicating that incriminating evidence existed on Pollard's phone. No "mere fishing expedition" was involved.

The majority draws this language from *G.A.Q.L. v. State*, which in turn cited *United States v. Hubbell*, 530 U.S. 27, 44 (2000). But in *Hubbell*, the Government sought information by subpoena, not by search warrant. The Government never had to make a showing that it had probable cause to seize the disputed documents; it merely issued a grand jury subpoena to Hubbell. *Id.* at 31. The Supreme Court approved the District Court's characterization of the subpoena as a "fishing expedition" because the Government could not state with "reasonable particularity a prior awareness that the [documents] sought existed and were in Hubbell's possession." *Id.* at 32-33. In that context, this finding meant the demand for documents violated Hubbell's rights,

because the Government was merely compelling Hubbell to provide incriminating information without knowing what those documents might reveal, rather than seeking documents it could already identify without forcing Hubbell to produce them. This is why the Court characterized the Government's demand as a "fishing expedition."

Nothing of the sort occurred here. The State did not merely issue a subpoena for Pollard's phone with a hunch that it might provide incriminating information. Rather, the State introduced evidence showing, to a magistrate's satisfaction, that probable cause existed that Pollard's phone contained evidence of a crime. This evidence was what they sought, not the passcode that is the subject of this petition.

It is true that the *Hubbell* Court wrote that "*[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.* at 43 (emphasis supplied). The majority opinion suggests that this passage states a general rule that a requirement to tell police a "combination" violates the right against self-incrimination. I submit this claim misreads *Hubbell*. The State here was not asking Pollard to "assemble" anything. It already had probable cause that incriminating information was located on the phone. Compelling Pollard to provide the passcode in order to access this incriminating information is more like forcing him to surrender a key than embarking on a "fishing expedition" for unknown information.[1] In short, I believe that the characterization of the State's request as a "fishing expedition," and its relation to the foregone conclusion exception, amplify why this case is of great

[1] It is worth repeating that the opinion does not address whether it would be improper for the State to merely compel Pollard to unlock the phone by entering the passcode himself. And if this is not improper, then the demand for the passcode, which accomplishes the same result, cannot be deemed a "fishing expedition."

public importance, especially since the same point was made in *G.A.Q.L.*[2]

Certification of Conflict

In *Stahl*, the Second District concluded that the foregone conclusion exception applied to permit compulsion because the State proved that the passcode existed, the defendant knew it, and the passcode was self-authenticating:

> To know whether providing the passcode implies testimony that is a foregone conclusion, the relevant question is whether the State has established that it knows with reasonable particularity that the *passcode* exists, is within the accused's possession or control, and is authentic. The question is not the State's knowledge of the contents of the phone; the State has not requested the contents of the phone or the photos or videos on Stahl's phone. The State established that the phone could not be searched without entry of a passcode. A passcode therefore must exist. It also established . . . that the phone was Stahl's and therefore the passcode would be in Stahl's possession. That leaves only authenticity. And as

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[2] Admittedly, it is unclear whether the majority still adheres to this view. In its opinion, the majority ruled that the State's failure to "describe with reasonable particularity" the information it sought on Pollard's phone made its request a "mere fishing expedition," which invalidated the applicability of the foregone conclusion exception to Fifth Amendment rights. *Pollard,* 44 Fla. L. Weekly at D1576. But in its opinion on rehearing, the majority contends "whether the probable cause affidavit . . . was proper or a fishing expedition matters not," and that the specificity of the warrant is irrelevant to Pollard's Fifth Amendment protections. Maj. op. on rehearing at 2. If the majority now contends that a supposed lack of specificity of the warrant does not matter to the outcome of this case, then I agree. However, without this fact, the foregone conclusion exception requires disclosure.

> has been seen, the 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. 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 (citations omitted).

Similarly here, it is undisputed that the passcode existed and that Pollard knew it; the answers to the determinative questions in *Stahl* are the same. However, the majority applied a different analysis by questioning how precisely the State could identify the evidence it sought on the phone, rather than by focusing on the passcode as *Stahl* did. The majority consequently came to a different conclusion, finding that "unless the state can describe with reasonable particularity the information it seeks to access on a specific cellphone, an attempt to seek all communications, data and images 'amount[s] to a mere fishing expedition.'" *Pollard*, 44 Fla. L. Weekly at D1576 (quoting *G.A.Q.L.*, 257 So. 3d at 1064). Had this Court applied the holding of *Stahl*, we would have denied the petition for certiorari, but the majority employed a different analysis and granted certiorari. As such, the majority's opinion directly conflicts with *Stahl*.

The majority attempted to distinguish *Stahl* by stating that Stahl "initially agreed to allow police to search the phone, thereby inferring his knowledge of the passcode and its authenticity," finding that the Second District held "that the suspect's actions disclosed or authenticated the password sought (here by Stahl initially agreeing to allow police to access the phone)," thus making authentication a foregone conclusion, and concluding that Pollard, conversely, had never "previously given up his privilege in the password sought." *Id.* at D1575. This argument fails for two reasons.

First, Stahl initially consented to a search of his cellphone before withdrawing his consent after police recovered the

cellphone from his house, thus requiring the State to obtain a search warrant. *Stahl*, 206 So. 3d at 128. The State then found that it could not view the contents of the phone and moved to compel Stahl to produce his passcode. *Id.* It is clear that Stahl's initial consent was a waiver of his Fourth Amendment rights against unreasonable searches, requiring the State to obtain a search warrant. If Stahl had maintained his consent and handed his phone to the State, the State still could not have viewed the information inside it without obtaining the passcode. Thus, the majority's assertion that Stahl "had previously given up his privilege in the password sought," *Pollard*, 44 Fla. L. Weekly at D1575, is without support and further conflates the Fourth Amendment and Fifth Amendment protections. Regardless, *even if* Stahl had stated that he would provide his passcode before changing his mind, the majority provides no logical reason why we would use a passcode-centric approach to the foregone conclusion exception then, while utilizing a completely different content-centric approach when a defendant like Pollard simply admits that he knows the passcode to his phone (but does not briefly say he will provide it before changing his mind). This factual distinction is unsupported and would be meritless if it was.

Second, contrary to the majority opinion's assertion, *Stahl* did not hold that the authenticity requirement was satisfied because he "disclosed or authenticated the password sought" when he initially provided consent to search his phone; as discussed above, he never mentioned a passcode when he waived his Fourth Amendment rights. *Id.* The Second District found that the foregone conclusion exception "cannot be seamlessly applied to passcodes and decryption keys" without "recogniz[ing] that the technology is self-authenticating—no other means of authentication may exist." *Stahl*, 206 So. 3d at 136. *Stahl* concluded that "[i]f the phone or computer is accessible once the passcode or key has been entered, the passcode or key is authentic." *Id.* Despite the majority's contention, *Stahl* is clear that its ruling is based on the passcode's self-authentication rather than any purported disclosure of the password. This ruling is in clear conflict with the majority's conclusion that "simply because a compelled password unlocks a cellphone after the fact doesn't make it authentic ex ante." *Pollard*, 44 Fla. L. Weekly at D1575.

The majority decision is in direct conflict with *Stahl*, so I would grant the State's motion to certify conflict. [3]

Stacy A. Scott, Public Defender, and Logan P. Doll, Assistant Public Defender, Gainesville, for Petitioner.

Ashley Moody, Attorney General, Benjamin L. Hoffman, Assistant Attorney General, Edward Wenger, Chief Deputy Solicitor General, and Christopher Baum, Deputy Solicitor General, Tallahassee, for Respondent.

[3] The majority suggests I have turned my back on "the Founders" and their commitment to personal liberty and sees my position as "defend[ing] state powers to extract testimony." Maj. op. on rehearing at 2-3. I disagree with the majority that this case turns on one's "vision" of the Fifth Amendment. Rather, it turns on the application of the foregone conclusion exception established by the United States Supreme Court, which we cannot contradict even if it conflicts with our personal conception of the United States Constitution.