>> ALL RISE.
>> THE COURT WILL NOW TAKE UP THE CASE OF THE STATE OF FLORIDA V. GARCIA.
COUNSEL.
>> MR. CHIEF JUSTICE AND MAY IT PLEASE THE COURT, THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL CRIMINAL PROCEDURE, BUT IT'S ULTIMATELY NOT THE RIGHT CASE TO RESOLVE THAT QUESTION FOR THE SIMPLE FACT THAT MR. GARCIA HAS NOT ESTABLISHED THAT HE HAS IRREPARABLE HARM.
SO I'D LIKE TO START THIS MORNING BY EXPLAINING WHY THE DISTRICT COURT LACKS JURISDICTION.
AND I'LL DO SO IN TWO MAIN PARTS.
FIRST, MR. GARCIA HASN'T SUFFERED ANY FIFTH AMENDMENT INJURY AT ALL.
THAT WOULD HAPPEN ONLY IF HE WENT TO TRIAL AND WERE CONVICTED ON THE STRENGTH OF COMPELLED TESTIMONY WHICH--
>> WELL, LET ME ASK YOU ABOUT A LITTLE DIFFERENT SCENARIO IN RESPONSE TO THAT, THAT POINT.
WHAT THIS HAD GONE A STEP FURTHER AND MR.-- AND CORRECT ME IF I'M WRONG AND THIS HAS ALREADY HAPPENED, BUT MR. GARCIA HAD BEEN HELD IN CONTEMPT AND PUT IN JAIL FOR CONTEMPT FOR FAILING TO FOLLOW THE TRIAL COURT'S DIRECTIVE TO PRODUCE THE CODE.
WOULD HE HAVE NO REMEDY FOR THAT?
>> HE COULD TAKE AN IMMEDIATE APPEAL OF THAT CONTEMPT CONVICTION AND SENTENCE.
AND SO THAT REMEDY IS, OF COURSE, AVAILABLE TO HIM.
>> BUT THAT WOULD BASICALLY BE AN APPEAL OF A FINAL ORDER.
>> YES.
>> AND, BUT THE UNDERLYING QUESTION OF THE VALIDITY OF THE TRIAL COURT'S ORDER WOULD BE AT

ISSUE HERE AND WOULD BE
RESOLVABLE.
>> I BELIEVE SO, CHIEF JUSTICE
CANADY.
AND THAT'S CERTAINLY A ROUTE
THAT HE COULD TRAVEL TO GET
RELIEF HERE.
>> AND THAT, IF YOU WIN, THAT
MIGHT BE THE NEXT STEP, RIGHT?
>> THAT MAY WELL BE THE NEXT
STEP, OR HE MAY OPT TO REVEAL
THE PASS CODE.
AND IF WE ULTIMATELY CONVICT HIM
BASED ON THE STRENGTH OF
WHATEVER TESTIMONY AND ITS
FRUITS WE OBTAIN DURING OUR
EXECUTION OF THE SEARCH WARRANT,
HE WOULD OF COURSE HAVE THE
OPTION TO DIRECT APPEAL AND
RAISE ALL THE SAME FIFTH
AMENDMENT MERITS CLAIMS THAT HE
RAISES NOW.
>> SORT OF PREGNANT IN THAT IS A
CONCESSION, I THINK, RIGHT?
ARE YOU ADMITTING THEN THAT IF
IT CAME TO US IN THE CONTEXT OF
CONTEMPT PROCEEDINGS, THE FIFTH
AMENDMENT RIGHT WOULD HAVE
ATTACHED EVEN THOUGH THERE IS
NO, IN FACT, TRIAL.
THERE'S NO JURY, THERE'S NO
ATTACHMENT OF JEOPARDY.
A CONTEMPT FINDING WOULD HAVE
TRIGGERED THE APPLICABILITY OF A
FIFTH AMENDMENT TESTIMONIAL
CONCERN.
IS THAT, IS THAT ACCURATE?
>> JUSTICE COURIEL, WE SAY--
AND THIS IS THE DECISION FROM
THE EN BANC 11THER CIRCUIT--
THAT WHAT HE HAS EVOKED HERE IS
THE PROPHYLACTIC PROTECTION OF
THE RIGHT BUT NOT THE CORE
PROTECTION OF THE RIGHT WHICH IS
THE PROTECTION OF BEING
CONVICTED AT TRIAL BASED ON
COMPELLED TESTIMONY.
HE, OF COURSE, HAS THE RIGHT TO
INVOKE IF, IN FACT, THERE WOULD
BE FIFTH AMENDMENT-COMPELLED
TESTIMONY.
BUT OUR BASIC POINT AT LEAST ON
THIS FIRST INJURY IS THAT HE
HASN'T SUFFERED AN INJURY ONE

WAY OR THE OTHER.
THAT WOULD OCCUR ONLY AT TRIAL.
WE'RE NOT SAYING IF HE WERE
RIGHT ABOUT THE MERITS, HE
WOULDN'T BE ABLE TO INVOKE HERE.
WE THINK HE WOULD BE ABLE TO.
>> IS IT FLORIDA LAW IN A
CONTEXT OF CIVIL CASES THAT
SOMEONE CAN INVOKE THEIR FIFTH
AMENDMENT AND HAVE THAT REVIEWED
BY CERT BECAUSE IT WILL PRESENT
IRREPARABLE HARM?
>> THERE'S SOME DECISIONS OUT
THERE IN THE CIVIL CONTEXT.
WE HAVEN'T TAKEN A POSITION IN
THIS CASE ON WHETHER THOSE ARE
RIGHTLY DECIDED, AND WE DON'T
THINK THE COURT NEEDS TO GET TO
IT--
>> WOULDN'T YOUR POSITION
NECESSARILY DETERMINE THAT THOSE
ARE ERROR, IN ERROR AS A MATTER
OF LAW?
>> I DON'T THINK SO, JUSTICE
POLSTON.
THERE MIGHT BE-- SO, FIRST OF
ALL, THE CASES YOU'RE REFERRING
TO DON'T CLEARLY ARTICULATE A
THEORY OF IRREPARABLE HARM.
THEY BASICALLY ASSUME THAT'S
IRREPARABLE HARM.
THERE MAY BE THEORIES THAT WOULD
SUPPORT THE IDEA THAT THAT'S
IRREPARABLE HARM.
THE 11TH CIRCUIT HAS SOME CASE
LAW HANDILY IN WHITE WHICH SAYS
WHEN YOU ARE COMPELLED AS A
LITIGANT IN A CIVIL CASE TO
TESTIFY, THAT IS NOT GOVERNMENT
COMPULSION.
AND SO THE 11TH CIRCUIT'S CASE
LAW PERHAPS RAISES THE SPECTER
THAT THE DEFENDANT THERE
WOULDN'T BE ABLE TO SUPPRESS
THAT TESTIMONY IN A SUBSEQUENT
PROSECUTION.
I'M NOT SURE THAT THAT'S RIGHT
OR THAT'S HOW--
>> I DON'T UNDERSTAND WHY IT
SHOULD BE DIFFERENT IN A CIVIL
AND CRIMINAL CONTEXT.
BECAUSE IF YOU'RE IN A CIVIL
CONTEXT, AT THE HEART OF THE
MATTER YOU'RE AFRAID OF BEING

PROSECUTED FOR SOMETHING THAT'S GOING TO BE DIVULGED IN THAT MATERIAL, RIGHT?
SO IT SEEMS LIKE YOU WOULD BE MORE CONCERNED IN A CRIMINAL PROCEEDING THAN YOU EVEN WOULD BE IN A CIVIL.
>> WELL, SO THE DISTINCTION I'M TRYING TO DRAW, JUSTICE POLSTON, BETWEEN THE CIVIL CASES AND THE CRIMINAL CASES THAT THE 11TH CIRCUIT HAS DRAWN IS PERHAPS IF YOU'RE COMPELLED IN A CIVIL CASE, THERE'S BEEN NO GOVERNMENTAL COMPULSION.
THERE'S NO STATE ACTOR THAT'S COMPELLING YOU AND, THUS, THAT TESTIMONY AND ITS FRUITS COULD BE USED IN THE SUBSEQUENT CRIMINAL PROSECUTION.
THAT'S NOT TRUE IN THE CRIMINAL CONTEXT BECAUSE IT WOULD BE THE STATE THAT WOULD BE DOING THE COMPULSION.
SO THE DOCTRINE WOULD ATTACH HERE, AND WE WOULDN'T BE ABLE TO USE THOSE FRUITS AGAINST HIM AT TRIAL.
BUT AGAIN, I THINK THAT'S A MUCH MORE COMPLICATED AND NUANCED QUESTION, ONE THAT'S NOT IN FRONT OF THE COURT.
>> IT SEEMS PRETTY PERTINENT, TO ME AT LEAST.
>> THERE MAY BE JUSTIFICATIONS FOR THAT--
>> BECAUSE IT GOES TO IRREPARABLE HARM.
IF YOU SAY THERE'S IRREPARABLE HARM IN A CIVIL CONTEXT, WHY WOULDN'T THERE BE HERE?
>> I THINK IT GOES TO THE POINT OF WHETHER OR NOT THERE'S GOVERNMENT COMPULSION IN THE CIVIL CONTEXT.
>> AND SO ON THAT POINT THOUGH, I MEAN, FOR US TO SAY THAT THERE'S NO HARM HERE, IRREPARABLE HARM, DOES THAT MEAN WE HAVE TO SAY THAT THE COMPULSION STANDING ALONE IS NOT A PROBLEM, THAT THERE'S REALLY NO PROBLEM FOR THE FIFTH AMENDMENT PURPOSES UNTIL YOU

GET, UNTIL IT'S ACTUALLY USED
AGAINST YOU AND IT ACTUALLY
MATTERS?
>> THAT'S EXACTLY RIGHT.
>> NEXT, AND I MEAN, I
UNDERSTAND IN THE ABSTRACT THAT
ARGUMENT, BUT, I MEAN, IT
DOESN'T SEEM LIKE OUR-- AND
MAYBE IT'S THIS WHOLE
DISTINCTION BETWEEN THE
PROPHYLACTIC THING AND THE
ACTUAL PROHIBITION.
BUT IT SEEMS LIKE IT KIND OF
GOES AGAINST THE GRAIN OF OUR
SYSTEM IN GENERAL TO SAY WE'RE
INDIFFERENT TO THE COMPULSION AT
THIS STAGE.
WE REALLY ARE ONLY GOING TO CARE
ABOUT IT IF YOU END UP BEING--
[INAUDIBLE]
>> JUSTICE MUNIZ, THE CASE I DO
THINK STANDS FOR THIS IDEA THAT
THE COMPULSION ITSELF.
THAT HAS TO BE THE RULE THAT
COMES OUT OF CASTIGAR BECAUSE
THE GOVERNMENT CAN COMPEL YOU IN
THE ABSTRACT.
THERE'S NOTHING WRONG WITH THAT
SO LONG AS IT CAN'T HARM YOU AT
TRIAL BY INTRODUCING THE
STATEMENTS.
THERE IS NO ABSTRACT, DIGNITARY
OR PRIVACY INTEREST AT STAKE
THAT THE FIFTH AMENDMENT WE CAN
COMPEL YOU.
>> BUT IF IT TURNS OUT THOUGH
THAT IT WAS WRONG TO HAVE
COMPEL-- AND I KNOW YOU HAVEN'T
GOTTEN TO THE MERITS YET, BUT IT
IT WAS, IF YOU WERE COMPELLED ON
THE BASIS OF SORT OF LEGAL
ERROR--
[INAUDIBLE]
THEN THAT REALLY IS HARM THAT
WILL, THAT CANNOT BE UNDONE.
I MEAN, IN TERMS OF THE
CONVICTION.
SO BASICALLY, IT GETS BACK TO
THE COMPULSION ITSELF.
THE LAW RECOGNIZES.
>> RIGHT.
OF COURSE, THERE'S A MOUNTAIN OF
U.S. SUPREME COURT CASE LAW THAT
ANTICIPATES JUST THAT, CHAVEZ,

CASTIGAR AND ONE WAY OR THE
OTHER WE KNOW THE FRUIT OF THE
POISONOUS TREE DOCTRINE WOULD
COMPLY TO ANY COMPELLED
STATEMENTS HE MADE, SO ANYTHING
AFTER THAT POINT WOULD BE
TAINTED.
IF THERE IS, IN FACT, A FIFTH
AMENDMENT VIOLATION--
[INAUDIBLE]
GET INTO THE PHONE, SEARCH IT,
ANY PHYSICAL FRUITS WE FIND WILL
BE-- SO HIS REMEDY, ULTIMATELY,
IS, NUMBER ONE, HE COULD MOVE TO
SUPPRESS AT TRIAL ON THIS
THEORY.
THAT HASN'T HAPPENED YET.
WE DON'T KNOW IF WE WILL FIND
ANY FRUITS AND, OF COURSE, IF
HE'S CONVICTED AND SENTENCED, HE
CAN ALWAYS APPEAL.
THIS IS THE BASIC STRUCTURE THAT
OUR SYSTEM CREATES FOR CRIMINAL
DEFENDANTS WHEN THEY BELIEVE
THEY'VE BEEN HARMED THIS SOME
WAY.
SO DEFENDANTS COULD SAY ANY
NUMBER OF THINGS WOULD HARM THEM
IN THE SENSE THAT THEY'LL BE
CONVICTED.
SO ERRONEOUSLY INTRODUCED
HEARSAY EVIDENCE FOR WILLIAMS
RULE COLLATERAL CRIMES EVIDENCE.
ANY OF THAT COULD BE HARMFUL AT
TRIAL, COULD LEAD TO CONVICTION,
BUT YOU DON'T HAVE THE RIGHT TO
SEEK PRETRIAL.
>> CAN I ASK YOU A
MERITS-RELATED QUESTION?
>> OF COURSE.
>> SO DOES IT MATTER-- DO WE
HAVE, DO WE HAVE THE-- IS THIS
TEED UP IN A WAY THAT IF WE DID
GET TO THE MERITS, THAT WE COULD
DRAW THIS DISTINCTION BETWEEN
SOMEONE ENTERING THE PASS CODE
WHERE THE GOVERNMENT NEVER
ACTUALLY LEARNS WHAT IT IS, SO
YOU REALLY ONLY DO HAVE THIS
TESTIMONIAL ASPECT OF KNOWLEDGE
AND CONFIRMING THAT IT'S MY
PHONE GIVEN THAT HERE WHAT WAS
ASKED FOR AND WHAT THE DCA WROTE
ABOUT WAS ACTUALLY DISCLOSING

THE CODE ITSELF?
>> SO OUR FIRST POSITION HERE WHICH IS THAT THIS IS JUST NOT TESTIMONIAL TO BEGIN WITH, I THINK THAT YOU COULD RESOLVE THAT QUESTION HERE ON THE BASIS THAT WITHIN THE ORIGINAL MEANING OF THE FIFTH AMENDMENT A GRANT OF ACCESS SO THAT LAW ENFORCEMENT CAN EXECUTE A WARRANT IS CATEGORICALLY NOT TESTIMONIAL.
NOW, MORE DIRECTLY TO YOUR POINT, PERHAPS YOU THINK THAT THERE IS SOME DIFFERENCE BETWEEN BEING REQUIRED TO DISCLOSE YOUR PASS CODE AND BEING REQUIRED TO ENTER IT.
WE THINK AS A FUNCTIONAL MATTER THERE REALLY IS NO DIFFERENCE.
THE GOVERNMENT IN THIS CASE DOESN'T CARE WHAT THE CONTENTS OF THE PASS CODE IS.
THAT'S NOT USEFUL TO US IN ANY WAY EXCEPT THAT IT'S A GRANT OF ACCESS.
IT'S NOT THAT WE CARE ABOUT--
>> ISN'T IT DEMONSTRATIVE OF OWNERSHIP AND POSSESSION AT THE CRIME SCENE?
>> YEAH, SO-- RIGHT.
AND THAT GOES TO THE ACT OF PRODUCTION DOCTRINE.
BUT I UNDERSTOOD JUSTICE MUNIZ'S QUESTION TO SUGGEST THAT THERE IS SOME DIFFERENCE FOR THE PURPOSE OF THIS INQUIRY BETWEEN DISCLOSING YOUR PASS CODE AND BEING FORCED TO ENTER IT.
BUT TO YOUR POINT, EITHER OF THOSE THINGS INVOLVE AN ACT OF PRODUCTION.
THERE IS STILL AN IMPLICIT TESTIMONY CONVEYED WHEN HE EITHER INPUTS IT OR GIVES IT TO US.
HE'S SAYING I HAVE ACCESS TO THE PASS CODE, I KNOW WHAT IT IS AND THAT THE PASS CODE EXISTS.
OF COURSE, WITH THE FOREGONE CONCLUSION DOCTRINE, WE KNOW ALL THOSE THINGS.
>> IT'S ARGUABLE THAT THE FOREGONE CONCLUSION THING

CATEGORICALLY DOESN'T APPLY TO
THE ACTUAL PASS CODE.
IT DOES APPLY TO THESE OTHER
THINGS THAT YOU CAN INFER FROM
THE FACT THAT HE KNOWS THE PASS
CODE.
AND SO I JUST WAS CURIOUS ABOUT
THAT.
I MEAN, BECAUSE YOU SUGGEST, YOU
KNOW, IN YOUR BRIEF YOU SAY,
WELL-- AND, YOU KNOW, IT WOULD
BE LESS CONVENIENT FOR US, BUT
IF HE HAS TO JUST ENTER THE PASS
CODE, THEN THAT'S FINE.
AND I'M JUST WONDERING IF THE
COURT WERE INCLINED TO KIND OF
TAKE THAT OFF BRAND, THAT'S EVEN
PROCEDURALLY SORT OF AN OPTION.
>> SO, JUSTICE MUNIZ, IF IT WAS
THE COURT'S VIEW THAT THERE WAS
SIMPLY A DEFECT IN THE FORM OF
WHAT THE STATE ASKED FOR HERE,
WE WOULD TAKE THAT RULING.
THAT'S A WIN FOR US BECAUSE ON
REMAND WE COULD SIMPLY ASK FOR
THE RIGHT THING.
BUT I THINK THAT HELPS TO MAKE
THE POINT THAT, FUNCTIONALLY
SPEAKING, THERE'S NO DIFFERENCES
FOR THE PURPOSES THAT MR. GARCIA
IS CONCERNED ABOUT, WHICH IS THE
ACT OF PRODUCTION.
THERE'S NO DIFFERENCE IF HE'S
REQUIRED TO DISCLOSE THE PASS
CODE WHICH SAYS THAT HE KNOWS IT
OR IF HE'S REQUIRED TO MANUALLY
ENTER IT OR IF HE'S REQUIRED TO
PUT HIS THUMB ON THE PHONE TO
UNLOCK BIOMETRICS WHICH, OF
COURSE, WOULD SHOW THAT IT'S HIS
PHONE.
FOR ALL THESE REASONS THAT HE
CARES ABOUT, IT ALL BOILS DOWN
TO THE SAME THING.
BUT, OF COURSE, IF THE COURT'S
HOLDING IS THAT THERE'S A
PROBLEM IN WHAT WE ASKED FOR,
THAT SEEMS TO ME TO BE REMEDIED
BELOW.
SO I DO WANT TO TALK ABOUT OUR
THRESHOLD THEORY THAT THIS IS
JUST NOT TESTIMONIAL IN THE
FIRST PLACE.
AND THE PLAINEST WAY TO THINK

ABOUT THAT IS IF AT THE TIME OF
THE FRAMING A CONSTABLE WAS
ARMED WITH A WARRANT TO SEARCH A
HOME AND SHOWED UP AT THE
SUSPECT'S HOME, THERE WOULD HAVE
BEEN NOTHING THAT THE SUSPECT
COULD HAVE DONE TO TURN AWAY THE
LAW ENFORCEMENT OFFICER.
HE HAD A WARRANT SIGNED BY A
MAGISTRATE THAT AUTHORIZED THE
SEARCH AND, IN FACT, ORDERED THE
LAW ENFORCEMENT OFFICER TO GO
AND SEARCH.
SO THE CONSTABLE COULD HAVE DONE
EITHER OF TWO THINGS.
NUMBER ONE, UNDER PEYTON V. NEW
YORK, THE U.S. SUPREME COURT
SAID IT WOULD HAVE BEEN
CONSTITUTIONALLY REASONABLE FOR
HIM TO REQUIRE THE SUSPECT TO
UNLOCK HIS DOORS.
THE OFFICER COULD HAVE ACTUALLY
DEMANDED ENTRY AND BEEN GIVEN
ENTRY THERE.
AND SECOND, EVEN BARRING THAT,
THE OFFICER SIMPLY COULD HAVE
BROKEN DOWN THE DOOR.
THERE WERE NO DOORS AT THE TIME
THAT COULDN'T HAVE BEEN BROKEN
AND THEN ENTERED BY LAW
ENFORCEMENT.
SO THE POINT IS WARRANTS HAVE
ALWAYS EQUALED ACCESS.
WE DON'T THINK THAT CHANGES IN
TECHNOLOGY HAVE CHANGED THAT
BASIC REALITY.
IT WOULD HAVE BEEN, I THINK,
QUITE ABSURD FOR THE CONSTABLE
TO HAVE SHOWN UP TO THE HOME,
DEMANDED ENTRY AND FOR THE
SUSPECT TO HAVE PURPORTED TO
INVOKE HIS FIFTH AMENDMENT
RIGHT.
NO ONE WOULD HAVE THOUGHT THE
FIFTH AMENDMENT HAD ANYTHING AT
ALL TO SAY ABOUT THIS QUESTION
WHICH IS REALLY A QUESTION ABOUT
SEARCH AND SEIZURE.
>> ON ACCESS, I THINK ONE OF THE
BRIEFS ACTUALLY RAISED A
QUESTION WHETHER YOU REALLY NEED
THE PASS CODE OR NOT TO GET INTO
THE CONTENTS OF THE PHONE.
IS IT YOUR OPINION THAT, YES,

YOU REALLY NEED THE PASS CODE?
OR CAN YOU GET IT IN OTHER
MEANS?
>> SO I'LL SAY, NUMBER ONE, I
DON'T THINK THAT OUR THEORY OF
THIS BEING NON-TESTIMONIAL TURNS
ON THAT.
WE MAY NOT HAVE NEEDED THE
SUSPECT TO OPEN THE DOOR FOR US
AT THE FRAMING, BUT WE STILL
COULD HAVE COMPELLED THAT.
I THINK ONE WAY OR THE OTHER,
THIS MIGHT BE A COLLATERAL
POINT--
>> YOU MAY NOT NEED THE PASS
CODE, BUT YOU STILL WANT IT?
>> IT APPEARED-- WELL, THERE
MAY BE SOME CASES WHERE WE COULD
GET INTO THE PHONE.
THE RECORD HERE SAYS THAT WE
COULD NOT AND WE TRIED TO DO A
FORENSIC DOWNLOAD.
MORE BROADLY, THERE'S BEEN SOME
DEBATE ABOUT WHETHER TECHNOLOGY
OUT THERE ALLOWS US TO DECRYPT
PHONES.
WHAT I CAN TELL YOU BASED ON OUR
CONVERSATIONS WITH FDLE, THIS IS
MY UNDERSTANDING, IF THEY--
THERE ARE REALLY TWO CAMPS OF
DEVICES THAT WE MIGHT TRY TO GET
INTO THAT COULD BE ENCRYPTED.
THE FIRST WOULD BE HARD DRIVES,
LAPTOPS, COMPUTERS.
FDLE SAYS IT IS, IT CAN BE
NEARLY IMPOSSIBLE TO CRACK THOSE
IF THEY RECEIVE THE DEVICE WITH
THE BASIC ENCRYPTION THAT SHIPS
FROM THE FACTORY-ENABLED.
IT CAN BE ALMOST IMPOSSIBLE.
THE SECOND CAMP, OF COURSE, IS
WHAT IS AT ISSUE HERE, CELL
PHONES, ALTHOUGH I THINK YOUR
RULING WILL APPLY ACROSS THE
BOARD.
WITH CELL PHONES THE CASE IS A
LITTLE BIT BETTER FOR US.
THERE ARE SOME DEVICES THAT WE
CAN GET INTO.
IT DEPENDS ON WHETHER THESE
TECHNOLOGY COMPANIES HAVE BEEN
ABLE TO CRACK THOSE DEVICES.
NEWER DEVICES IT'S MUCH HARDER,
AND IT MAY EVEN MATTER TO THE

STATE THAT THE PHONE COMES IN.
SO THAT'S PERHAPS A TECHNICAL ANSWER, BUT IT LOOKS LIKE EVEN NOW THERE WILL BE MANY DEVICES WE CAN'T GET INTO.
HOWEVER, EVEN MORE GENERALLY WHAT PROFESSOR KERR SAYS IS THAT THIS IS AN ARMS RACE BETWEEN ENCRYPTION AND DECRYPTION, AND ENCRYPTION OVER TIME IS LIKELY TO ULTIMATELY PREVAIL BECAUSE OF THE MATHEMATICS HERE.
SO EVEN IF TOMORROW WE HAVE THE TECHNOLOGY TO GET INTO MR. GARCIA'S PHONE, A MONTH FROM NOW THE SOFTWARE COMPANIES MIGHT SEND OUT AN OPERATING SYSTEM UPDATE WHICH WOULD DIVEST US OF THAT ABILITY.
>> SO ON YOUR POINT ABOUT IT NOT BEING TESTIMONY, IT SEEMS LIKE BOTH THE COURTS AND THE ACADEMICS WHO AGREE WITH YOUR ULTIMATE POSITION ON THE MERITS SAY THAT THEY DO THINK THAT IT IS TESTIMONIAL.
AND DID I, DID-- IS THERE A GOOD AUTHORITY ON THE OTHER SIDE IN THIS?
NOT JUST BY ANALOGY LETTING SOMEONE INTO YOUR HOUSE, BUT THAT'S THE BEST AUTHORITY LOOKING AT THIS SPECIFIC QUESTION THAT JUST SAYS THAT THE THRESHOLD IS NOT TESTIMONIAL AT ALL?
>> SO THE STAAL CASE COMES CLOSE.
I DON'T QUITE THINK IT'S THIS OUR CORNER THERE.
THE FACT OF THE MATTER IS, JUSTICE MUNIZ, THE FACT THAT THIS IS SIMPLY NON-TESTIMONIAL AT THE GATE HAS NOT BEEN ADOPTED BY THE COURT.
I DON'T KNOW THAT IT'S BEEN ADVANCED BY ANY COURT.
IT IS A LITTLE BIT SOMETHING NEW AS FAR AS THE DOCTRINE THAT'S OUT THERE.
AS FAR AS U.S. SUPREME COURT CASES, NONE OF THEM ARE ON POINT, BUT THERE ARE SOME THAT ARE USEFUL GUIDANCE.

I THINK THAT THE DOE II CASE
COMES VERY CLOSE AS FAR AS
PHYSICAL ANALOGS GO.
WHAT HAPPENS IN DOE II IS THAT
THE GOVERNMENT LEARNS THAT DOE
HAS FOREIGN BANK ACCOUNTS AND
THE GOVERNMENT, OF COURSE, CAN'T
GET IN UNLESS IT HAS A SIGNED
CONSENT FORM, CONSENT AGREEMENT
FROM DOE.
AND SO IT ASKS HIM TO FILL OUT
THIS CONSENT FORM WHICH REQUIRES
HIS SIGNATURE.
AND, OF COURSE, IF THE SIGNATURE
DOESN'T MATCH WHATEVER SIGNATURE
THE BANK HAS ON FILE, THE BANK'S
NOT GOING TO LET THE GOVERNMENT
IN.
SO IT NEEDS THE SIGNATURE TO BE
ACCURATE AND, OF COURSE, THE
SIGNATURE USED THE CONTENTS OF
THE MIND.
SO WHAT THE SUPREME COURT SAID
THERE WAS THAT WASN'T
TESTIMONIAL.
THAT WAS JUST SIGN ME A PIECE OF
PAPER, MORE OR LESS EQUIVOCAL,
THAT HAS AS AN INCIDENCE TO THE
SIGNATURE GRANTED POSSESSION.
THAT'S WHAT WE THINK IS
HAPPENING HERE.
THE PASS CODE HERE IS MORE OR
LESS THE SAME AS A SIGNATURE.
IF IT'S NOT ACCURATE, ACCESS
ISN'T GRANTED AND THE COURT
SAYS, WELL, THAT'S OKAY.
THAT'S NOT TESTIMONY.
SO WHAT WE'RE ASKING FOR IS
MAYBE SOMETHING A LITTLE BIT
DIFFERENT THAN WHAT THE OTHER
COURTS HAVE DONE, BUT I STILL
THINK WE'RE ON FIRM FOOTING.
I GO BACK TO THE HOUSE ANALOGY
BECAUSE I THINK IT'S A POTENT
ONE.
HE HAS NO RIGHT IN 1791 TO SAY
I'M NOT LETTING YOU IN.
>> I CAN'T REMEMBER IF IT'S DOE
I OR II, WHETHER THERE'S THE
DISCUSSION ABOUT COMPARING
ACCESS TO, ACCESS TO A
COMBINATION FOR A SAFE.
>> RIGHT.
>> AS OPPOSED TO A KEY.

I THINK THAT'S THE COMPARISON.
>> RIGHT.
>> THEY WERE SAYING IT'S, IT WAS MORE LIKE A KEY THAN THE COMBINATION TO A SAFE.
AM I REMEMBERING THAT CORRECTLY?
>> YES.
SO--
>> DOESN'T THAT-- MAYBE THAT'S DICTA, YOU KNOW, WHATEVER.
DOESN'T THAT KIND OF CUT AGAINST YOU HERE?
>> WELL, I'M NOT SURE.
IN THE CONTEXT OF DOE II WHERE THE ANALOGY WAS FIRST USED, THE COURT, I THINK, BELIEVED THAT THE SIGNATURE WAS MORE LIKE THE KEY AND, THUS, WAS NOT TESTIMONIAL.
>> BUT IN THE CONTEXT THERE, DOESN'T IT SUGGEST THAT THE REQUIRING THE COMBINATION TO THE SAFE WOULD BE PROBLEMATIC?
THEY ESSENTIALLY CONCEDE THAT.
>> SO TWO THINGS ABOUT THAT, JUSTICE CANADY.
THOSE ARE NOT-- SO IT APPEARS IN HUBBEL AS WELL, IN THE MAJORITY OPINION OF HUBBEL.
THOSE CASES ARE NOT SEARCH WARRANT CASES.
SO OUR THEORY OF THIS BEING NON-TESTIMONIAL TURNS ON THE EXISTENCE OF A SEARCH WARRANT.
SO NUMBER ONE, I THINK IT'S INAPPLICABLE FOR THAT REASON.
AND NUMBER TWO, EVEN IN HUBBEL I THINK IT'S DICTA.
IT'S A HELPFUL ANALOGY THAT THE COURT RELIED ON.
THE COURT DIDN'T PURPORT TO ANSWER THAT QUESTION, AND SO YOU CAN STILL DECIDE WHETHER YOU THINK THAT ANALOGY MAKES SENSE IN THIS CONTEXT.
AND WE THINK ULTIMATELY IT DOESN'T BECAUSE FOR THE REASONS I WAS DISCUSSING WITH JUSTICE MUNIZ, THERE'S NO PRACTICAL FUNCTIONAL DIFFERENCE BETWEEN REVEALING THE PASS CODE AND BEING FORCED TO MANUALLY UNLOCK THE PHONE.
>> COUNSEL, WE HAVE EATEN UP

YOUR REBUTTAL TIME HERE.
I'M GOING TO GIVE YOU THREE ADDITIONAL MINUTES, BUT THAT'S STARTING TO RUN DOWN.
>> THANK YOU VERY MUCH.
>> MAY IT PLEASE THE COURT, MY NAME IS ROBERT ADAMS.
I AM APPEARING ON BEHALF OF THE RESPONDENT, JONATHAN DAVID GARCIA.
YOUR HONORS, FORCING A CRIMINAL DEFENDANT TO DISCLOSE A PASS CODE VIOLATES THE FIFTH AMENDMENT BECAUSE IT COMPELS THE DEFENDANT TO BECOME A WITNESS AGAINST HIMSELF.
THE FIFTH DCA AGREED WITH THIS PROPOSITION, AND DESPITE THE STATE'S ARGUMENT TO THE CONTRARY, THE FIFTH DCA HAD JURISDICTION TO ISSUE ITS WRIT OF CERTIORARI.
THE TRIAL COURT'S ORDER DID COMPEL ACTUAL TESTIMONY FROM MR. GARCIA TO WHICH THE FOREGONE CONCLUSION EXCEPTION HAS NOT BEEN APPLIED AND SHOULD NOT BE APPLIED.
AND THE FOREGONE CONCLUSION EXCEPTION, IF IT WERE TO BE APPLIED BY THE COURT, SHOULD REQUIRE THE STATE TO DEMONSTRATE BY A HIGH BURDEN AT AN EVIDENTIARY HEARING BEFORE THE TRIAL COURT THAT WHAT THEY'RE SEEKING, THE TESTIMONIAL VALUE OF WHAT THEY'RE SEEKING ACTUALLY IS A FOREGONE CONCLUSION BASED ON THE INFORMATION THEY ALREADY HAVE.
AND THAT WAS NOT DONE BELOW.
SO IT CANNOT BE APPLIED HERE.
TURNING TO THE QUESTION OF JURISDICTION, PETITIONER CLAIMS THAT MR. GARCIA HAS NOT SUFFERED ANY INJURY, WILL NOT SUFFER ANY INJURY FROM THE COMPULSION ORDER ITSELF.
THIS IS NOT CORRECT.
THE COMPULSION ORDER DOES INJURE THE DEFENDANT IN THE SAME WAY THAT JUSTICE POLSTON SUGGESTED IT WOULD INJURE A CIVIL LITIGANT THAT THE DISTRICT COURTS HAVE

ACCEPTED.
THE CONCEPT HERE OF A HARM THAT CANNOT BE ADEQUATELY REMEDIED ON APPEAL IS THAT IF YOU WERE TO COMPEL A CIVIL LITIGANT TO PROVIDE THE ANSWER TO THE QUESTION THAT SUPPOSEDLY BRINGS ABOUT INCRIMINATING INFORMATION, THAT CIVIL LITIGANT MAY BE SUBJECTED TO CRIMINAL PROSECUTION THAT THEY'RE NOT CURRENTLY FACING.
THAT'S TRUE EVEN WHERE THE DEFENDANT IS ALREADY FACING SOME CRIMINAL PROSECUTION.
BECAUSE IF THE COMPELLED COMMUNICATION PROVIDES EVIDENCE OF CRIMES TO WHICH THE LAW ENFORCEMENT DOES NOT KNOW, THEY'RE NOW GOING TO BE FACING FURTHER PROSECUTION.
FOR INSTANCE, IN THIS CASE WE HAVE THE ALLEGED VICTIM COME TO LAW ENFORCEMENT AFTER THE ISSUANCE OF THE ARREST WARRANT AND SAY I FOUND THIS GPS DEVICE IN MY CAR.
I BELIEVE THAT MR. GARCIA PLANTED IT THERE.
>> WHEN IS THAT INJURY SUFFERED? IS IT SUFFERED WHEN LAW ENFORCEMENT LEARNS OF THESE ADDITIONAL FACTS OR WHEN THE PROSECUTION HAPPENS AND THE TRIAL RIGHTS ATTACH?
>> IT WOULD BE SUFFERED WHEN HE'S COMPELLED TO GIVE THE STATEMENT THAT GIVES LAW ENFORCEMENT THAT KNOWLEDGE, THAT KNOWLEDGE TO SUPPORT BRINGING ABOUT THE CHARGE.
>> I GUESS MY TROUBLE WITH THAT IS THAT IT SEEMS LIKE PERHAPS YOU'RE SPEAKING ABOUT SOME PRIVACY INTERESTS THAT YOU'RE SAYING SORT OF FLOATS AROUND THE TRIAL RIGHT.
BUT I DON'T SEE IN WHAT MR. D'SOUZA REFERRED TO AS A MOUNTAIN OF SUPREME COURT CASE LAW ANY SUPPORT FOR THAT PROPOSITION.
I FIND INSTEAD THE SUPPORT FOR THE PROPOSITION THAT THE INJURY

IS SUFFERED WHEN JEOPARDY
ATTACHES AND EVIDENCE IS
INTRODUCED AND THE JURY RELIES
UPON THAT EVIDENCE.
HELP ME UNDERSTAND HOW THIS MORE
ATTENUATED INTEREST OR THIS
DIFFERENT INTEREST SOMEHOW
ATTACHES AS SOON AS THE LAW
ENFORCEMENT, YOU KNOW, TEAM
LEARNS WHAT IT LEARNS.
>> WELL, ONCE THEY'VE LEARNED
THAT INFORMATION, THE MERE FACT
THAT THE LITIGANT IN A CIVIL
CASE OR THE DEFENDANT IN A
CRIMINAL CASE CAN BE SUBJECTED
TO CRIMINAL PROSECUTION THEY
WEREN'T INITIALLY FACING WOULD
BE ITSELF A HARM.
>> I'M NOT SURE I AGREE.
CAN YOU DIRECT ME TO A CASE THAT
SAYS THE EXISTENCE OF THAT
POSSIBILITY IS ITSELF A HARM AS
OPPOSED TO THE PROSECUTION?
>> SURE.
THERE'S THE CASE FROM THE THIRD
DCA.
THERE'S ALSO CASES THAT WERE
CITED IN BOTH THE INITIAL BRIEF
AND THE ANSWER BRIEF RECOGNIZING
THAT THESE ARE THE OPINIONS OF
MULTIPLE DISTRICT COURTS BELOW.
I DON'T THINK EVEN THE
PETITIONER IS DISAGREEING THAT
THOSE WERE HOLDINGS OF CIVIL
CASES THAT COMPELLING A CIVIL
LITIGANT NORMALLY IN THE CONTEXT
OF A DEPOSITION PROVIDED
INCRIMINATING TESTIMONY IN THAT
DEPOSITION MIGHT OPEN THEM UP
NOT ONLY TO THE PROSPECT OF
HAVING TO REVEAL PRIVILEGED
INFORMATION, BUT TO THE PROSPECT
OF HAVING TO REVEAL INFORMATION
ABOUT CRIMES THAT ARE NOT YET
KNOWN.
AND WHILE THE PETITIONER CLAIMED
IN THE INITIAL BRIEF THAT THOSE
CASES ARE AN OPPOSITE TO A CASE
THAT INVOLVES A CRIMINAL
DEFENDANT, I JUST DON'T SEE THAT
TO BE TRUE.
IT SEEMS TO BE DISTINCTION
WITHOUT A MEANINGFUL DIFFERENCE.
THE CIVIL LITIGANT AND THE

CRIMINAL DEFENDANT, MR. GARCIA, ARE IN THAT SAME POSITION.
GIVEN HOW UBIQUITOUS CELL PHONES ARE WITH EVERYDAY LIFE AND HOW OFTEN THEY'RE USED FOR THINGS THAT WOULD INVOLVE PRIVILEGED COMMUNICATIONS, IT'S ALSO ENTIRELY PLAUSIBLE THAT IF A CRIMINAL DEFENDANT WERE TO PROVIDE THAT KIND OF ACCESS BY DIVULGING THE PASS CODE, BY GIVING THAT TESTIMONY, THEN THEY WOULD ALSO END UP OPENING THE DOOR TO PRIVILEGED INFORMATION AS WELL THE SAME WAY THAT THE CIVIL LITIGANT WOULD WHEN THE DCA'S DECIDED THAT CIVIL LITIGANT HAD HARM THAT COULD NOT BE REMEDIED UPON DIRECT APPEAL.
ONCE THAT CAT'S OUT OF THE BAG, IT CAN'T BE PUT BACK IN.
UNFORTUNATELY, IT CREATES A SITUATION WHERE IF THE DCAs ARE INCORRECT UP UNTIL THE FOSTER CASE FROM THE FIRST DISTRICT COURT, THEN THE LITIGANT WOULD BE IN THE POSITION OF HAVING TO ATTEST IN THEIR PETITION OR PERHAPS IN RESPONSE TO A MOTION TO DISMISS AS TO WHAT SPECIFICALLY THE HARM WOULD BE THAT THEY WOULD FACE FROM BEING COMPELLED TO GIVE THIS INCRIMINATING STATEMENT.
AND, OF COURSE, THAT CREATES A PARADOXICAL CIRCUMSTANCE WHERE THE LITIGANT IS HAVING TO GIVE INDICIA OF WHAT THE HARM THEY WILL SUFFER IS, GIVE SOME INDICATION OF WHAT NEW EVIDENCE OF AN UNKNOWN CRIME OR WHAT PRIVILEGED INFORMATION MIGHT ACTUALLY EXIST IN THE CONTENTS OF THEIR STATEMENT OR BY IMPLICATION FROM THE CONTENTS OF THEIR STATEMENT.
TO DO THAT WOULD BE TO ESSENTIALLY SAY, WELL, IN ORDER TO ASSERT YOUR FIFTH AMENDMENT RIGHT AGAINST COMPELLED SELF-INCRIMINATION, YOU'RE GOING TO HAVE TO DO A LITTLE BIT OF SELF-INCRIMINATION SO THAT WE KNOW YOU'RE COMING TO US WITH A

GENUINE ARTICLE OF HARM.
>> WHAT DO YOU MAKE OF THE FACT THAT THE AMENDMENT SPEAKS OF BEING A WITNESS AGAINST YOURSELF, RIGHT?
IT DOESN'T SAY OF SUPPLYING INFORMATION, IT DOESN'T SAY OF PROVIDING INFERENCES, IT SAYS OF BEING A WITNESS.
RIGHT?
>> THAT'S TRUE.
YOUR HONOR, FOR THAT I WOULD DIRECT THE COURT'S ATTENTION TO THE HUBBEL CASE FROM THE UNITED STATES SUPREME COURT.
THAT ADDRESSES, WE BELIEVE, THE STATE'S ARGUMENT THAT THIS IS EXCLUSIVELY A TRIAL RIGHT.
WE DON'T THINK THAT THE UNITED STATES SUPREME COURT AGREES WITH THAT INTERPRETATION.
AND JUSTICE STEVENS' WRITING FOR THE MAJORITY OPINION SAID THAT THE PHRASING IN ANY CRIMINAL CASE OF THE TEXT OF THE FIFTH AMENDMENT MIGHT HAVE-- TO COMPEL TESTIMONY THAT'S USED AGAINST THE DEFENDANT IN THE TRIAL ITSELF.
IT HAS, HOWEVER, LONG BEEN SETTLED THAT IT PROTECTS COMPELLED STATEMENTS THAT LEAD TO THE DISCOVERY OF EVIDENCE EVEN THOUGH THE STATEMENTS THEMSELVES ARE NOT INCRIMINATING AND NOT INTRODUCED INTO EVIDENCE.
SO IT DIVORCES THIS CONCEPT OF THE HARM FROM A STATEMENT AND THE POTENTIAL FOR VIOLATING THE FIFTH AMENDMENT FROM THE QUESTION OF WHAT ACTUALLY ENDS UP GETTING USED IN TRIAL.
AND THE FACT THAT YOU'RE BEING FORCED TO COMPEL-- OR BEING FORCED TO PROVIDE SELF-INCRIMINATING INFORMATION OR GIVE A SELF-INCRIMINATING STATEMENT EVEN IF IT ISN'T ULTIMATELY USED ISN'T THE QUESTION.
THE QUESTION IS WHETHER OR NOT THAT ACT IN AND OF ITSELF VIOLATES THE FIFTH AMENDMENT.

NOW, IT MAY NOT PROVIDE GROUNDS
FOR BRING A 1983 CLAIM TO
FEDERAL COURT FOR DAMAGES, BUT
IT DOES CREATE A VIOLATION FOR A
NUMBER OF CIVIL LITIGANTS AND
FOR WHICH THERE'S NO DIFFERENCE
FOR A CRIMINAL DEFENDANT WHO'S
FACING THE SAME TYPE OF ORDER.
>> CAN I ASK YOU-- I'M SORRY.
I KNOW ON THE CERTIORARI ISSUE
MOST OF THE ARGUMENTS HAVE
FOCUSED ON THE HARM QUESTION,
BUT ISN'T THE OTHER PART OF THE
TEST THAT THE ERROR HAS TO BE
SOMETHING WHERE THE LAW THAT WAS
DEPARTED FROM BY THE TRIAL COURT
WAS CLEARLY ESTABLISHED?
AND IT DOESN'T SEEM TO ME
LIKE-- THIS SEEMS LIKE THE
OPPOSITE OF CLEARLY ESTABLISHED.
>> TO THAT, WE WOULD-- OUR
ARGUMENT IS THAT IT IS CLEARLY
ESTABLISHED BECAUSE IT IS CLEAR
FROM THE MEANING OF THE FIFTH
AMENDMENT.
IT'S CLEARLY ESTABLISHED BECAUSE
THIS CIRCUMSTANCE CLEARLY
INVOLVES AN ORDER COMPELLING
MR. GARCIA TO TESTIFY AGAINST
HIMSELF.
THIS ISN'T LIKE THE
CIRCUMSTANCES AT FISHER OR DOE.
IN DOE II IT'S MORE LIKE THE
CONCURRING OPINION'S SUGGESTION
OF THE DIFFERENCE BETWEEN
PROVIDING A COMBINATION TO A
LOCK VERSUS A KEY.
BASED ON THOSE OPINIONS, THE
CENTRAL REQUIREMENT TO THE LAW
WOULD HAVE COMPELLED THE COURT,
COMPELLED JUDGE ADAMS TO LOOK AT
THE CIRCUMSTANCES AND SAY YOU'RE
ASKING FOR THE COURT TO GIVE AN
ORDER THAT COMPELS MR. GARCIA TO
REVEAL THE CONTENTS OF HIS MIND.
NOT TO GIVE YOU A KEY OR UNLOCK
A CABINET LIKE IN THE FISHER
CASE AND HAND OVER A DOCUMENT
INSIDE THE CABINET.
INSTEAD YOU'RE ASKING HIM TO
ESSENTIALLY REVEAL SOMETHING
THAT'S ONLY CONTAINED IN HIS
MEMORY.
YOU'RE ASKING HIM TO CREATE THAT

TESTIMONY TODAY, THIS AFTERNOON, TOMORROW MORNING.
IT HAPPENED TO BE TOMORROW MORNING BECAUSE MR. GARCIA WASN'T PRESENT THAT DAY.
BUT EITHER WAY, WHETHER IT'S WE'RE GOING TO SHOW YOU THE PHONE SCREEN AND YOU'RE GOING TO TYPE IT IN IN FRONT OF US,
YOU'RE GOING TO WRITE IT DOWN, HAND IT TO YOUR ATTORNEY, YOUR ATTORNEY HANDS IT TO US, YOU SPEAK IT IN OPEN COURT, ALL OF THOSE REQUIRE THE DEFENDANT TO ACTUALLY PROBE THE CONTENTS OF HIS MIND AND THEN REVEAL THE CONTENTS OF HIS MIND.
IT RELIES ON HIS TRUTH-TELLING FUNCTION WHICH IS A DISTINGUISHABLE ELEMENT THAT'S NOTED IN THE FISHER CASE.
BECAUSE IF HE GIVES THE WRONG PASS CODE, HE COULD FACE PERJURY.
>> YOU'RE TALKING ABOUT THE CONTENTS OF THE MIND.
HOW DOES THAT FIT IN WITH THE CIRCUMSTANCE WHERE THERE'S-- YOU COULD GET IN WITH YOUR FINGERPRINT?
FINGERPRINT'S NOT THE CONTENTS OF YOUR MIND.
AND IT MAY BE, YOU KNOW, MAYBE THEY DON'T EVEN HAVE TO SHOW 'EM.
YOU JUST GIVE 'EM YOUR HAND AND THEY, YOU KNOW, THEY TRY THE DIGITS AND THEY GET IN THAT WAY.
HOW DOES THAT-- SHOULD THAT, IN PRINCIPLE, BE TREATED DIFFERENTLY BECAUSE IT'S NOT A REVELATION OF THE CONTENTS OF SOMEONE'S MIND?
>> YES, IT SHOULD.
AND TO BE CLEAR, THERE'S A COUPLE OF PROBLEMS WITH APPROACHING THIS PARTICULAR ISSUE BEFORE THE COURT ON THESE CIRCUMSTANCES WITH THAT ANALYSIS BECAUSE AS BOTH THE PETITIONER AND RESPONDENT HAVE RECOGNIZED, REALISTICALLY SPEAK, THE FINGERPRINT PROBABLY WON'T PROVIDE ACCESS AT THIS POINT.

MOST PHONES HAVE A TIME OUTLAW
THAT REQUIRE YOU TO USE A PASS
CODE.
UNFORTUNATELY, WE JUST COME
RIGHT BACK AROUND TO SEEKING
REVIEW FROM THIS COURT.
THE OTHER PROBLEM WITH THAT IS
IF IT WERE TO BE LIKE A NORMAL
ORDER FOR FINGERPRINT EXEMPLARS
WHERE THE COURT IS COMPELLING
THE DEFENDANT TO SHOW UP AND
PLACE ALL TEN FINGERS ON AN INK
PAD AND THEN PLACE THE INKED
FINGERS ALL ON A PIECE OF PAPER,
ALL OF THOSE PRINTS WOULD BE
COMPARED AGAINST WHATEVER LATENT
PRINTS WERE PULLED FROM A CRIME
SCENE.
THAT WOULD NOT BE TESTIMONIAL.
THAT'S NON-TESTIMONIAL ACT OF
SURRENDER, ACT OF PRODUCTION.
HOWEVER, IF THE ORDER WERE TO
SAY INSTEAD USE THE FINGER THAT
YOU USED TO LOCK THIS PHONE--
>> YEAH.
BUT MY QUESTION DIDN'T ASK ABOUT
THAT.
AND IT'S ASSUMING THAT JUST GIVE
'EM THE HANDS--
>> SURE.
>>-- GO THROUGH IT ONE BY ONE.
MAYBE START WITH THE THUMB
BECAUSE THAT'S MAYBE THE MOST
LIKELY.
>> IF IT WERE IDENTICAL TO
FINGERPRINT EXEMPLARS WHERE IT'S
JUST A PROCESS OF ELIMINATION
AND HE WAS JUST COMPELLED PUT
THIS FINGER, THIS FINGER, THIS
FINGER WITHOUT THE CONTENTS OF
HIS MIND, THAT WOULD BE
DISTINGUISHABLE.
>> WHAT DIFFERENCE DOES THAT
MAKE?
[LAUGHTER]
I'M JUST TRYING TO UNDERSTAND
WHY GIVEN THE WHOLE CONTEXT HERE
THAT IS NOT HIGH PERFORMALISTIC
OF LOOKING AT THIS.
>> IT DOESN'T PROBE THE CONTENTS
OF HIS MIND AND HE DOESN'T
ACTUALLY CONCEDE ANYTHING BUT
JUST PUTTING HIS FINGER ON A
PIECE OF GLASS OR WHATEVER IT

MAY BE.
THAT DOESN'T HAVE THE SAME TESTIMONIAL QUALITIES THAT BEING ASKED TO PRODUCE SOMETHING THAT'S ONLY CONTAINED IN HIS MIND WOULD.
THERE ARE SOME IMPLICIT TESTIMONIAL QUALITIES TO THE MERE FACT THAT HE COULD UNLOCK THE PHONE, AND THOSE MIGHT BE SUBJECT TO THE FOREGONE CONCLUSION.
BUT THAT WOULD STRAY FAR FROM THE ACTUAL FACTS THAT THE COURT IS PRESENTED WITH IN THIS CASE WHERE, INESCAPABLY, WHAT THE TRIAL COURT WAS TELLING THE DEFENDANT YOU HAVE TO DO IS TELL THE STATE THE PASS CODE THAT'S AND SO IF THE PROHIBITION IS ON HELPING THE GOVERNMENT OR PROVING ITS CASE AGAINST YOU, ESSENTIALLY BEING MADE TO BE PART OF THEM GATHERING THE PHONE AND EVERYTHING.
ISN'T THAT THE PROBLEM WITH THE SOME, IN THE SAME WAY OF REVEALING THE PASSCODE IN ANOTHER WAY OF PROBING THE DEFENDANT INTO THE CONTENTS OF THE PHONE?
>> IT MAY HAVE IMPLICIT TESTIMONIAL QUALITIES.
IN THAT RESPECT IT MAY BE A SITUATION THE STATE NEEDS TO DEMONSTRATE A FOREGONE CONCLUSION AN EXCEPTION HAS BEEN MET TO COMPEL THE FINGERPRINT BUT TO SAY IT IS TANTAMOUNT TO TESTIMONY THE WAY THE TRIAL COURT IS ABOUT THE TESTIMONY THERE'S A DISTINGUISHABLE DIFFERENCE.
A DIFFERENCE BETWEEN BEING REQUIRED TO TELL US YOU HAVE SOMETHING MEMORIZED VERSUS PUT ALL OF YOUR FINGERS, UNTIL IT UNLOCKS OR NEVER UNLOCKS.
>> IS THERE A DIFFERENCE BETWEEN REVEALING THE CODE VERSUS HYPING IT IN WITHOUT THE GOVERNMENT KNOWING WHAT YOU TYPED IN?
>> YES BECAUSE IN BOTH THOSE CASES YOU ARE ASKING THE

DEFENDANT TO UTILIZE THE
CONTENTS OF THE MIND TO UNLOCK
THE PHONE AND CREATING EVIDENCE
WHERE THEY CAN BE USED AT TRIAL
EVEN IF I TYPICALLY THE PHONE
RECEPTACLE RESEARCHED AND THE
RELEVANT INFORMATION FOUND ON
THE PHONE, THE WITNESS WHO WAS
IN COURT THAT THEY SAID THE
INVESTIGATING OFFICER, COME INTO
COURT AND SAY ON SUCH AND SUCH A
DATE, TO UNLOCK THE PHONE WITH
HIS FINGERS AND HE TYPED IN SOME
NUMBERS, DIDN'T SEE WHAT NUMBERS
AND AFTER THE PHONE WAS HANDED
BACK THE PHONE WAS UNLOCKED AND
THE JURY WOULD BE FREE TO INFER
HE HAD THE PASSCODE THAT WAS
EFFECTIVE WHEN IT WAS RECOVER
FROM THE CRIME SCENE WHICH
INFERS HE WAS IN POSSESSION OF
THE PHONE IF LEFT AT THE CRIME
SCENE MAKING THE STATES CASE
THAT HE WAS THE ONE WHO WAS AT
THE ALLEGED VICTIM'S NEW
BOYFRIEND'S HOME.
>> WOULD THERE BE SOME SENSE IN
LOOKING AT THIS IN A BIG WAY AND
BIFURCATING THE WAY YOU ANALYZE
THE ISSUE BASED ON THE PURPOSE
FOR WHICH THE REQUEST IS MADE.
FOR EXAMPLE EVEN WITH THE KEY TO
A SAFE, THE ACT OF OPENING THE
SAFE COULDN'T BRING AN AGENT TO
SAY WE WILL PROVE HE HAD CONTROL
OF THE SAFE BECAUSE HE GOT THE
KEY AND IT WAS HIS KEY AND HE
UNLOCKED IT AND SEEMS LIKE IT
WOULD BE PROBLEMATIC.
THE FIFTH AMENDMENT COMPELLED TO
ACT AND CONVERSELY IF THE
GOVERNMENT FORCES YOU TO COMPEL
THE PASSCODE OR ANYTHING ELSE
THAT REQUIRES THE MIDDLE PROCESS
OR ANYTHING ELSE THAT WOULD MEAN
THEY COULDN'T USE THAT
INFORMATION TO PROVE CONTROL,
BUT THAT'S NOT THE PURPOSE.
WHY CAN'T WE LOOK AT IT?
THE FIFTH AMENDMENT WAS NOT
INTENDED TO ALLOW THE PRIVILEGE
TO BE ASSERTED IN ORDER TO
THWART THE GOVERNMENT'S ACCESS
THE INFORMATION YOU HAD A LAWFUL

WARRANT TO ACCESS.
IT SEEMS THERE OUGHT TO BE -
DOES THAT MAKE SENSE?
>> THAT CONFLATES FOURTH
AMENDMENT ISSUE WITH FIFTH
AMENDMENT ISSUE, A DIFFERENCE
BETWEEN LAW ENFORCEMENT HAVING
THE ABILITY ONCE IT SHOWS A
MAGISTRATE OR ON CALLED JUDGE
THAT THEY HAVE PROBABLE CAUSE,
TO GO INTO A HOME ASKING A
DEFENDANT TO PARTICIPATE IN
PROVIDING THEM WITH INCREMENTING
EVIDENCE THAT WOULD FURTHER
THEIR SEARCH.
TO STATE IS OBSTRUCTING THEM
FROM PERFORMING THE SEARCH IS
HAPPENSTANCE OF THE DEVELOPMENT
OF THIS TECHNOLOGY IN THE
DIGITAL AGE.
THE REALITY IS ENCRYPTION
TECHNOLOGY HAS TO BE DATED BY
DECRYPTION TECHNOLOGY, IS
AVAILABLE TO THE PETITIONER.
>> WHAT ABOUT ENCRYPTION WITHOUT
TECHNOLOGY, ONLY JUSTICE MINIS
BROUGHT THIS TO MY ATTENTION BUT
PROFESSOR KERR WRITES ABOUT A
LETTER WRITTEN INSIGHT FOR.
CHIEF JUSTICE MARSHALL DECIDES
IT IS NOT AN ACT BARRED BY THE
FIFTH AMENDMENT FOR A COURT TO
COMPEL SOMEONE, TO KNOW WHAT THE
CIPHER IS, WHAT THE CODE IS,
WHAT SECRET LETTER IS USED TO
DECODE, WOULD YOU HAVE THE SAME
ARGUMENTS IF IT WERE AN
OLD-SCHOOL VERSION OF
ENCRYPTION, IT IS IN CODE AND I
REFUSE TO TELL YOU WHAT THE CODE
IS TO MAKE SENSE OF THE WORDS.
THE SAME ARGUMENTS APPLY?
>> THE SAME ANALYSIS APPLIES.
A CIRCUMSTANCE LIKE FISHER WHERE
THERE WAS A CODEC'S THE
CONVERTED THE CIPHER TO PLAIN
LANGUAGE THAT WAS PREVIOUSLY
CREATED BY THE DEFENDANT AND
EVEN HELD BY ANOTHER PERHAPS
WHOEVER THE MESSAGE WAS BEING
SENT TO THAT COMPELLED
PRODUCTION WOULD BE DIFFERENT
BECAUSE IT DOESN'T REQUIRE THE
DEFENDANT TO PROBE THE CONTENTS

OF HIS OWN MIND TO PROVIDE THAT INFORMATION.
OF THE ORDER IS COMPELLING HIM TO PROBE THE CONTENTS OF HIS MIND AND PROVIDE OR CREATE A CODEX, THIS IS HOW YOU DECIPHER MY CIPHER AND GIVE PLAIN MEANING TO THE DOCUMENT THE STATE HAS LIKE INCRIMINATING EVIDENCE THAN THAT WOULD BE THE SAME ANALYSIS AND WOULD REACH THE SAME CONCLUSION THAT YOU ARE ASKING THE DEFENDANT TO BECOME A WITNESS AGAINST HIMSELF REGARDLESS WHETHER IT LEADS TO INFORMATION YOU USE AT TRIAL.
IT RAISES THE POSSIBILITY THAT YOU DON'T KNOW WHAT IS IN THE DOCUMENT JUST AS YOU DON'T KNOW WHAT IS IN THE PHONE OR MAY COME OUT OVER THE STATEMENT THAT IS INVOKING THE FIFTH 2 AVOID REVEALING, YOU DON'T KNOW WHAT INFORMATION MIGHT BE INVOLVED WHETHER IT INVOLVES PRIVILEGED INFORMATION OR INFORMATION THAT RELATES TO OTHER CRIMES AND BECAUSE OF THAT SPECTER OF A NEW HARM THAT CANNOT BE REMEDIED BECAUSE IT IS OUT OF THE BAG THAT CREATES TOTAL VIOLATION FOR THE PURPOSES OF APPELLATE REVIEW AND JURISDICTION FOR THE DISTRICT COURT.
>> IT SEEMS YOUR SIDE IS CONFLATING THE FOURTH AND FIFTH AMENDMENT.
IT SEEMS LIKE OVERBREADTH AND GETTING ACCESS TO MORE ON THE PHONE THAN WHAT THE GOVERNMENT SHOULD BE ABLE TO ACCESS FOR PURPOSES OF INVESTIGATING THIS CRIME.
ALL THOSE THINGS SHOULD BE DEALT WITH, NOT SWEPT INTO THIS ISSUE OF GIVING THE GOVERNMENT TAXES JUST LIKE LETTING THE GOVERNMENT INTO YOUR HOUSE AND WHAT THEY ARE ALLOWED TO DO ONCE THEY ARE IN THERE.
>> IF HE IS COMPELLED TO PROVIDE A PASSCODE ASSUMING HE CAN AND THE PASSCODE WORKS, THAT PROVIDED EVIDENCE THE STATE

DIDN'T PREVIOUSLY HAVE.
THAT'S OUR CONTENTION.
>> THE OWNERSHIP OF THE PHONE IS DISPUTED BUT IF THIS CASE WERE JUST ABOUT THE WEATHER, THERE WAS EVIDENCE TO SHOW THAT IT WAS HIS PHONE, THAT IS NOT WHY WE ARE HERE.
LET'S ASSUME THE STATE HAS EVIDENCE THAT IT IS YOUR CLIENT'S PHONE AND JUST A MATTER OF UNLOCKING IT.
WHERE DOES THAT LEAVE US?
>> THE QUESTION STILL REMAINS WHAT TESTIMONY THE STATE IS ASKING THE DEFENDANT TO PROVIDE WHETHER IT IS PRODUCTION A TESTIMONIAL SO LONG AS THE ORDER REQUIRES PASSCODE OUR POSITION IS THAT HIS TESTIMONY.
>> THE FOREGONE CONCLUSION DOCTRINE COMES INTO PLAY.
>> WE BELIEVE THE FOREGONE CONCLUSION DOCTRINE COMES INTO PLAY WHEN WE ARE DEALING WITH AN ACTIVE PRODUCTION, NOT ACTUAL TESTIMONY.
THE ACTIVE PRODUCTION MAY HAVE TESTIMONIAL QUALITIES, THEN THE STATE CAN DEMONSTRATE SOMETHING IS A FOREGONE CONCLUSION THAT THE PHONE IS LOCKED, THE DEFENDANT HAS THE PASSCODE TO UNLOCK IT AND THE EVIDENCE THEY ARE SEEKING BEHIND THE PASSCODE WALL MAY IDENTIFY AND THEY KNOW TO BE THERE, THE LANGUAGE OF FISHER, THAT IT EXISTS THAT IS AUTHENTIC.
IF THEY CAN DEMONSTRATE THOSE THINGS ARE A FOREGONE CONCLUSION BY BEYOND REASONABLE DOUBT STANDARD A TO PROTECT SUCH ESSENTIAL RIGHT THEN THE STATE WOULD BE ABLE TO DO IT ASSUMING IT NO LONGER REQUIRES THE DEFENDANT TO PROBE THE CONTENTS OF HIS MIND.
>> YOU ARE A COUPLE MINUTES OVER AT THIS POINT BUT WE HELPED YOU WITH THAT SO I WILL GIVE YOU A MINUTE TO SUM UP.
>> BECAUSE THE DEFENDANT, THE TRIAL COURT COMPELS THE

DEFENDANT TO PROVIDE SOME
STATEMENT THAT HAS NOT YET BEEN
ENTERED IT IS DIFFERENT FROM THE
SITUATION WHERE THE DEFENDANT
HAS A MOTION TO SUPPRESS, TO GET
THE EXCLUSIONARY RULE TO APPLY
TO SUPPRESS STATEMENTS THAT HAVE
ALREADY COME OUT THROUGH WHAT IS
ARGUABLY A COERCIVE
INTERROGATION WHICH ARE
STATEMENTS THE CASE RELIES ON
WHICH IS NOT COGNIZABLE INJURY
FOR THE REVIEW.
THIS CIRCUMSTANCE CREATES THE
SPECTER OF HARM THAT CANNOT BE
ADEQUATELY REMEDIED ON DIRECT
APPEAL BECAUSE YOU DON'T KNOW
THE CONTENTS OF THE TESTIMONY
AND SINCE IT IS A CIVIL CASE
THEY INVOLVE INFORMATION THAT IS
PRIVILEGED AND MAY INVOLVE
INFORMATION THAT INCRIMINATE THE
DEFENDANT FOR CRIMES HE'S NOT
FACING.
ALSO IT CREATES THIS ULTIMATUM
TO COMPLY WITH THE ORDER OR FACE
A NEW CHARGE OF CONTEMPT AND
THOSE CIRCUMSTANCES WE BELIEVE
JURISDICTION DOES LIE WITH THE
FIFTH DISTRICT, HAD PROPER
JURISDICTION, WATCHING THE TRIAL
COURT'S ORDER, THE TRIAL COURT
ORDER COMPELS ACTUAL TESTIMONY
TO FOREGONE CONCLUSION EXCEPTION
DOES NOT APPLY BECAUSE IT
REQUIRES, INCRIMINATING
INFORMATION AGAINST HIMSELF.
FOR THOSE REASONS WE ASK THE
COURT TO AFFIRM THE FIFTH DCA'S
ORDER.
>> REBUTTAL?
>> THERE HAVE BEEN ADDITIONAL
THEORIES PROPOUNDED BY MISTER
GARCIA, WHAT THEY BELIEVE HIS
INJURIES ARE, THE CLEAREST YOU
CAN FIND WOULD BE PAGE 5 OF
RELYING THE DISTRICT COURT.
THEY TURN OVER MY PASSCODE, AND
DAMAGING TO ME AND CAN BE USED
IN CRIMINAL PROSECUTION THAT WE
KNOW THE DOCTRINE WOULD APPLY TO
ALL OF THAT AND THAT TAKES IT
OFF OF THE TABLE AND MY ACTIVE
PRODUCING THE PASSCODE COULD

SHOW IT IS MY PHONE AND IF THAT
WERE INTRODUCED AT TRIAL WHICH
WE DON'T INTEND TO INTRODUCE BUT
IF IT WERE INTRODUCED AGAINST
HIM AT TRIAL HE WOULD STILL HAVE
THE SAME REMEDY CRIMINAL
DEFENDANTS ALWAYS HAVE TO TAKE
AN APPEAL.
>> WHAT IS NEW IS THIS IDEA
THERE COULD BE THINGS ON THE
PHONE THAT ARE OTHER RELEVANT
STUFF THAT HAS NOTHING TO DO
WITH IT.
>> WE THINK --
>> YOU SAY THAT IS WHAT YOU ARE
ALLUDING TO WITH A NEW THEORY.
>> THE CIVIL DISCOVERY CASES,
THAT'S NOT THE THEORY HE PLED IN
HIS PETITION, VERY SPECIFIC IN
HIS PETITION, AND DISTRICT COURT
ASSESS IRREPARABLE INJURY BASED
ON INJURIES THE DEFENDANT
HIMSELF IS NOT ASSERTED THESE.
NUMBER 2, YOU REFERENCE
PROFESSOR'S DECRYPTION ORIGINAL
ZONE ARTICLE.
THAT ARTICLE HELPS US BUT OUR
CASE IS SOMEWHAT STRONGER STILL
FOR TWO REASONS.
IN THE AARON BURR TRIAL THERE
WAS NO WARRANT INVOLVED SO FAR
AS THE TRANSCRIPT I READ.
THEY HAVE A RIGHT OF ACCESS.
IN THAT CASE TO DECIPHER THE
DOCUMENTS TO TRANSLATE THE
DOCUMENT FROM ONE TO ANOTHER.
THE DOCUMENT WAS PROTECTED BY A
CIPHER.
ALL I AM SAYING IS WE NEED TO
GET PAST THE DOOR.
THAT DOOR IS ENCRYPTED BUT IT IS
NOT AS THOUGH ONCE WE GET PAST
THE DOOR, THEY TRANSLATE THE
DOCUMENTS FOR US.
I WOULD LIKE TO ANSWER ANY
ADDITIONAL QUESTIONS THE COURT
MAY HAVE BUT NOTHING FURTHER TO
ADD HAD THIS POINT.
>> THANK YOU BOTH FOR YOUR
ARGUMENT IN THIS CASE TODAY.
THAT IS THE LAST CASE ON TODAY'S
DOCKET.
THE COURT WILL NOW BE ADJOURNED.