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56 MAP 2018

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 56 MAP 2018

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

JOSEPH J. DAVIS,
Appellant

BRIEF FOR APPELLEE

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the Order of the Superior Court at No. 1243 MDA 2016 dated November 20, 2017, Reconsideration denied February 5, 2018, Affirming the Order of the Luzerne CountyCourt of Common Pleas, Criminal Division, at Nos. CP-40-CR-291-2016 and CP-40-MD-11-2016 dated June 30, 2016

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COUNTER-STATEMENT OF THE QUESTIONS INVOLVED[1]

I. Whether this Court should dismiss as waived Davis' claim that Article I, Section 9 of the Pennsylvania Constitution provides broader

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[1] The factual premises inherent in the wording of the question presented as defined by Davis and adopted by this Court are inaccurate and misleading and therefore unfairly stack the deck against the Commonwealth in this appeal. Specifically, the issue as framed by Davis assumes that: (a) Davis has memorized the purportedly 64-character password at issue in this litigation but has not previously voluntarily written it down or documented it in some other manner; and (b) the trial court's order under review is limited to requiring Davis to orally disclose the password to law enforcement authorities. In fact, although the record establishes that Davis knows and is in sole possession of the password, it does not reveal whether Davis has memorized and/or documented in writing that password. Moreover, the trial court's order simply mandates that "the Defendant supply the Commonwealth with any and all passwords used to access the…computer…" (R. at 56a).

This is highly significant because **if the password was voluntarily recorded in a writing by Davis prior to entry of the order in question, it would not be subject to the constitutional privileges invoked by Davis because the element of compulsion would be lacking.** *See United States v. Doe*, 465 U.S. 605, 610-614 and notes 8-10 (1984) ("If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document [that is the subject of a subpoena or search warrant] are not privileged"); *United States v. Hubbell*, 530 U.S. 27, 36 (2000) ("Because the papers had been voluntarily prepared prior to the issuance of the summonses, they could not be said to contain compelled testimonial evidence…Accordingly, the taxpayer could not "avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing"). For this reason, and because the Court was presumably unaware of these record facts, the Commonwealth addresses a slightly different question that encompasses but is not limited to the question identified by the Court.

protection against self-incrimination than the Fifth Amendment to the United States Constitution with regard to compelled acts of production given that the first time he articulated this claim was in this Court and he took a contrary position in the courts below?

Not addressed by the Courts below.

II. Whether this Court should hold that the Forgone Conclusion Doctrine applies to render Davis' judicially-compelled act of producing the password to his encrypted but lawfully-seized computer non-testimonial and therefore not violative of the Fifth Amendment to the United States Constitution or Article I, Section 9 of the Pennsylvania Constitution?

Answered in the affirmative by the Courts below.

COUNTER-STATEMENT OF THE CASE

I. Form of Action

Appellant Joseph Davis ("Davis") seeks reversal of the November 30, 2017 Opinion and Order of the Pennsylvania Superior Court ("the Superior Court") affirming the June 30, 2016 Order of the Luzerne County Court of Common Pleas ("the trial court") that requires Davis to produce to law enforcement authorities the password in his possession that will allow access to the contents of his lawfully-seized encrypted computer which he has already admitted contains evidence of criminal conduct.

II. Relevant Procedural History

On February 11, 2016, the Commonwealth filed a Criminal Information charging Davis with two counts of sexual abuse of children (distribution of child pornography)[2] and two counts of criminal use of a communication facility.[3] This was based on information obtained by law enforcement officials following an investigation into Davis' use of a computer utilizing peer-to-peer file sharing software to share videos

[2] 18 Pa.C.S.A. § 6312(c)
[3] 18 Pa.C.S.A. § 7512(a)

depicting child pornography with others. That investigation included the execution of a judicially-approved search warrant at Davis' residence on October 10, 2015, during which an encrypted HP Envy 700 desktop computer ("the computer") was seized.

Fifty-six days prior to filing the Criminal Information -- on December 17, 2015 -- the Commonwealth filed a pretrial motion in the trial court seeking an order to compel Davis to provide law enforcement officials with the password to the encryption program on his computer that prevents access to the contents of the computer ("the motion to compel"). On January 14, 2016, the trial court conducted an evidentiary hearing on the motion to compel.

Thereafter, both parties filed post-hearing briefs in the trial court. The Commonwealth's brief acknowledged that:

> The Fifth Amendment of the US Constitution, as well as Article 1, Section 9 of the Pennsylvania Constitution both contain a privilege against self-incrimination. **The Pennsylvania Supreme Court has determined that these privileges are governed by the same standards.** *Commonwealth v. Hawthorne*, 428 Pa. 260, 262-263 (1968).

In accordance with this Court's holding in *Hawthorne* and many other decisions, the Commonwealth's brief cited federal case law construing the

Fifth Amendment of the United States Constitution ("the Fifth Amendment") for its argument that under the Forgone Conclusion Doctrine first established by the United States Supreme Court in *Fisher v. United States*, 452 U.S. 391 (1976), an order compelling Davis to produce the password to his computer does not violate Davis' rights against self-incrimination under the Fifth Amendment or Article I, Section 9 of the Pennsylvania Constitution ("Article I, Section 9"). The Commonwealth requested "that Joseph Davis be ordered to assist the Commonwealth in the execution of the previously executed search warrant by providing his TrueCrypt password to his HP Envy computer or by inputting the password into the device."

Davis's post-hearing brief contended that requiring the production of the password would violate his rights under the Fifth Amendment and Article I, Section 9. However, the brief stated: **"The Pennsylvania Supreme Court has determined that these privileges are governed by the same standard." Davis' brief cited only to federal caselaw construing the Fifth Amendment and failed to present any argument that Article I, Section 9 provides different or more substantial protection than its federal counterpart in the context of this case. The brief did not present the trial court with the "Edmunds analysis" that this Court has stated is necessary**

to the advancement of an independent state constitutional law argument. *See, e.g.*, *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).[4]

On June 30, 2016, the trial court entered an order granting the motion to compel, which specifically required that "Defendant supply the Commonwealth with any and all passwords used to access the HP Envy 700 desktop computer with serial # Z4Z1AAAEFM or [sic] within thirty (30) days from the date of this order." The trial court filed an opinion in support of its order on the same day. That opinion construed Davis' right against self-incrimination by citing to decisions of the United States Supreme Court and other federal and state courts. **Because an independent state constitutional law argument had not been advanced by Davis, the trial court's opinion did not address the subject.**

On July 15, 2016, Davis filed in the trial court a counseled motion for permission to appeal the trial court's interlocutory June 30, 2016 order

[4] The *Edmunds* decision identified four "factors to be briefed and analyzed by litigants in each case hereafter implicating a provision of the Pennsylvania constitution." *Jubelirer v. Rendell*, 953 A.2d 514, 522-523 (Pa. 2008).

immediately.[5] In response thereto, the trial court entered an order on July 20, 2016 granting the motion and stating that:

> This Court is of the opinion that the Order of June 30, 2016 involves a controlling issue of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this matter.

On July 29, 2016, Davis filed in the trial court a counseled "notice of appeal" alleging that the order appealed from is appealable as a collateral order under Pa.R.A.P. 313. On August 8, 2016, the Superior Court entered an order directing Davis to show cause why the appeal should not be quashed as taken from an unappealable order. Davis filed his response to the order to show cause on August 22, 2016.

Meanwhile, on August 17, 2016, Davis inexplicably filed a counseled petition for review in the Superior Court. The Superior Court disposed of that filing on October 5, 2016 by denying the requested review and noting that Davis should have filed a petition for permission to appeal per Pa.R.A.P. 1311 and 42 Pa.C.S.A. § 702(b) instead of a petition for review per Pa.R.A.P.

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[5] Although not indicated in the motion, Davis was presumably relying upon Pa.R.A.P. 1311 and 42 Pa.C.S.A. § 702(b), which address interlocutory appeals taken with permission of the courts.

1511 *et seq.* In the same order, the Court discharged the rule to show cause in connection with the notice of appeal and referred the issue of appealability of the interlocutory order to the merits panel assigned to the appeal.

Davis filed a Rule 1925(b) Statement in the trial court on August 17, 2016. **That Statement made no reference to a state constitutional law argument that is independent of the Fifth Amendment jurisprudence adhered to by the state and federal courts in connection with the right against self-incrimination.**

On September 27, 2016, the trial court filed a Rule 1925(a) Opinion that incorporated by reference its June 30, 2016 Opinion. Davis filed his counseled appellant's brief in the Superior Court on January 13, 2017. That brief referenced the Fifth Amendment as well as Article I, Section 9 but **presented no developed argument whatsoever advancing a state constitutional law argument separate and distinct from the governing Fifth Amendment jurisprudence. He did not argue to the Superior Court that the right against self-incrimination contained in Article I, Section 9 provides broader protection than its counterpart in the Fifth Amendment.**

Indeed, the only Pennsylvania decision cited in Davis' brief to the

Superior Court was *Commonwealth v. Carrera*, 227 A.2d 627, 629 (Pa. 1967), *superseded by statute on unrelated grounds*, which held that:

> The privilege [against self-incrimination], if properly invoked in a state proceeding, **is governed by federal standards.** In other words, the standards to be now used in determining whether or not the silence of one questioned about the commission of a crime is justified **are the same in both state and federal proceedings.**

Davis' appellant's brief **did not present an "Edmunds analysis" or otherwise argue for the Court to draw a distinction between the state and federal constitutional provisions.**

On May 15, 2017, the Commonwealth filed its appellee's brief in the Superior Court. In response to the arguments presented in Davis' appellant's brief, the Commonwealth's brief cited to jurisprudence governing the proper construction of the Fifth Amendment of the federal Constitution. Davis thereafter filed a short reply brief that **referenced three federal court decisions applying the analysis that governs self-incrimination issues arising under the Fifth Amendment.**

Oral argument was conducted. Not a word was uttered by counsel for Davis during those proceedings implying, much less directly advocating,

that the state constitutional provision provides broader protection than the federal one.

On November 30, 2017, a three-judge panel of the Superior Court[6] filed a unanimous published Opinion that affirmed the trial court's order compelling Davis to produce the password pursuant to the Foregone Conclusion Doctrine ("the FCD"). In its Opinion, the Court noted that:

> Our supreme court has recognized that Article I, § 9 of the Pennsylvania Constitution "affords no greater protections against self-incrimination than the Fifth Amendment to the United States Constitution." *Commonwealth v. Knoble*, 42 A.3d 976, 979 n.2 (Pa. 2012) (citation omitted).

Commonwealth v. Davis, 176 A.3d 869, 874 n. 6 (Pa. Super. 2017).

On December 7, 2017, Davis filed an application for rehearing/reargument *en banc.* Therein, Davis cited only to legal authority construing the Fifth Amendment and the FCD. **He made no reference to a state constitutional law argument separate and distinct from the governing Fifth Amendment jurisprudence.** On February 5, 2018, the Superior Court denied that application.

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[6] The panel was comprised of the Honorable Susan Gantman, P.J., the Honorable Jack Panella, and the Honorable Kate Ford-Elliot, P.J.E..

On March 7, 2018, Davis filed a petition for allowance of appeal in this Court. In that document, Davis **for the very first time articulated an independent state constitutional law claim:**

> The Court should therefore grant the appeal in this case to explore whether Article I, Section 9, of the Pennsylvania Constitution independently forbids compulsion of self-incriminating evidence even if the federal courts might deem the existence of the information a "foregone conclusion. Upon such review, the Court should reject that doctrine as a matter of state constitutional law.

On October 3, 2018, the Court granted that petition, indicating that

The issue, as stated by Petitioner, is:

> May [Petitioner] be compelled to disclose orally the memorized password to a computer over his invocation of privilege under the Fifth amendment to the Constitution of the United States, and Article I, [S]ection 9 of the Pennsylvania Constitution?[7]

On November 19, 2016, Davis filed his appellant's brief and reproduced record. On the same day, an *amicus curiae* brief was filed by the Electronic Frontier Foundation.

III. Facts Necessary for Determination

The parties do not dispute the relevant facts.

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[7] As noted *supra*, this articulation of the question presented is cramped and at variance with the record facts.

In July 2014, agents from the Office of Attorney General ("OAG") conducted an undercover investigation into the possession and distribution of child pornography via the internet. The investigation focused on individuals using an online peer-to-peer electronic file-sharing network known as "eMule" (R. at 33a).

On July 14, 2014, agents determined that a computer at IP address 98.235.69.243 was used to share child pornography. Specifically, agents used computers running specially-designed investigative software to make a direct connection to the device at IP address 98.235.69.243 and downloaded an electronic file transferred from that device which was believed to be child pornography (R. at 33a-34a).[8] Thereafter, Special Agent Justin Leri viewed the file and determined that it was a video that depicted a prepubescent child engaging in unlawful sexual activity. It was a 26-minute video showing a prepubescent boy laying naked on a couch as an adult male masturbates him. The male then removes his clothing and the boy begins to simultaneously masturbate the adult male. This is followed by the adult male lubricating his penis and performing anal sex on the boy (R. at 34a).

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[8] Technical details regarding the manner in which the investigative software works may be found in the reproduced record at 36a.

Agent Leri subsequently determined that the IP address was registered to Comcast Cable Company ("Comcast") (R. at 34a). OAG agents then obtained and served upon Comcast a court order directing the disclosure to law enforcement of the subscriber information related to that particular IP address, with which Comcast complied. As a result, OAG agents determined that the subscriber for IP address 98.235.69.243 was Joseph Davis, 2 Bertram Court, Apartment 12, Edwardsville, PA 18704 (R. at 34a).

OAG agents determined that Davis was born on May 31, 1955 (R. at 34a). Agent Leri thereafter obtained a warrant from Luzerne County Magistrate Judge Roberts to search that residence, which agents executed on September 9, 2014 (R. at 34a). The only occupant, Davis, acknowledged understanding and voluntarily waived his Miranda rights, **admitted to being the sole user of the Dell computer system found in the residence**, and denied the existence of any child pornography on the computer (R. at 35a-36a). He also stated that he had previously been arrested for child pornography offenses and "did my time for that" (R. at 35a).

Agents seized the Dell computer and two DVDs. Officers from the OAG Computer Forensics Unit ("CFU") attempted without success to

analyze the computer system in the residence. The computer had no readable data (R. at 43a). The search was terminated and no arrest was made. (R. at 35a). Agents subsequently learned from Davis that he had wiped his computer clean with a DVD known as "DBAN" just days prior to the execution of the search warrant (R. at 41a).

Fifteen months later, on October 4, 2015, OAG agents again conducted an undercover investigation of individuals using the eMule network to share child pornography. At that time, they observed that IP address 174.59.168.185.6359 was distributing electronic files of child pornography. A direct connection was made from OAG computers using investigative software to IP address 174.59.168.185.6359 and agents downloaded one electronic file transferred to them that contained suspected child pornography. Special Agent Dan Block then viewed the downloaded file and determined that the file was a video of a prepubescent child engaging in prohibited sexual activity (R. at 37a). More specifically, the video depicts an adult male engaging in multiple acts of anal sex with a boy between the ages of 9 and 11 in which the boy is seen crying and appears to be in pain (R. at 38a).

Agent Block subsequently determined that the IP address was registered to Comcast (R. at 37a). He then sent an administrative subpoena to Comcast directing the disclosure to law enforcement of the subscriber information related to that particular IP address, with which Comcast complied. As a result, OAG agents determined that the subscriber for IP address 174.59.168.185.6359 was Joseph Davis, 2 Bertram Court, Apartment 12, Edwardsville, PA 18704-2548 (R. at 38a).

OAG agents thereafter obtained a warrant from a court to search that residence, which the agents executed on October 20, 2015. Davis was the sole occupant of the residence. He voluntarily waived his Miranda rights and agreed to speak with the agents (R. at 38a). At that time, he informed the officers that: (1) he has lived alone in the apartment since 2006; (2) he has not had any long-term guests during his time at the residence; (3) he utilizes Comcast internet and has done so on and off for many years; (4) he does not have "wi-fi" and only uses hardwired internet services so that no one can steal his "wi-fi;" **(5) he is the sole user of the desktop computer in the residence; and (6) the desktop computer is password-protected and only he knows the password that allows access to the computer** (R. at 39a).

Agent Block asked Davis to give him (Agent Block) the password and Davis refused to do so (R. at 39a).

Davis also informed the officers that: (1) he watches pornography on the computer, which is legal and he uses a credit card; (2) he has previously been arrested for child pornography; (3) child pornography is legal in other countries like Japan and the Czech Republic; (4) he does not understand why it is illegal here; and (5) what people do in the privacy of their own homes is their own business (R. at 39a).

Agents located the desktop computer in the home, which was an HP Envy 700 ("the computer"). OAG CFU agents attempted to analyze it, but Special Agent Braden Cook determined that the computer was encrypted with an encryption software known as "TrueCrypt" that prevented OAG agents from accessing the contents of the computer. In order for the computer to "boot" into the Windows operating system, a user-created password must be input into the "TrueCrypt" volume (R. at 43a-44a). According to Agent Cook, "when the computer power is [turned] on, it goes

directly to a screen that says, "TrueCrypt Boot Version 7.1" and it requires a password to be entered in order to have the computer function" (R. at 44a).[9]

Following his arrest, **Davis stated to the agents that his computer was encrypted with "TrueCrypt" and he claimed he could not remember the password (R. at 41a). He also told Agent Block that "even if he could…it would be like, quoting him exactly, putting a gun to his head and pulling the trigger"** (R. at 41a). Thereafter, when Agent Block asked him if he remembered the password, **Davis said "he would die in jail before ever remembering the password"** (R. at 41a).

Approximately an hour or two after the agents entered Davis' residence, following his arrest, agents transported him to court for an

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[9] "Encryption technology allows a person to transform plain, understandable information into unreadable letters, numbers, or symbols using a fixed formula or process. Only those who possess a corresponding **'key'** can return the information into its original form, i.e. decrypt that information. Encrypted information remains on the device in which it is stored, but exists only in its transformed, unintelligible format. Although encryption may be used to hide illegal material, it also assists individuals and businesses in lawfully safeguarding the privacy and security of information. Many new devices include encryption tools as standard features, and many federal and state laws either require or encourage encryption to protect sensitive information." *United States v. Apple Macpro Computer*, 851 F.3d 238, 242 n. 1 (3rd Cir. 2017) (emphasis added).

arraignment. During the transport, Davis voluntarily spoke with Agent Block. According to Agent Block:

> While we were in transport to his arraignment, Mr. Davis was talking about gay x-rated movies he likes to watch and stated **he liked 10, 11, 12, and 13 year olds, referring to them as "a perfectly ripe apple."** He further stated he didn't see what the big deal was. He's not taking kids and raping them. There's nothing wrong with watching kids that age in the privacy of your own home…
>
> **…Then I asked if he would give the password [to me]. He replied, "It's 64 characters and why would I give that to you? We both know what's on there [the computer]. It's only going to hurt me. No fucking way I'm going to give it to you."** Then he made several jokes referring to the password but did not give us the password.

(R. at 39a-40a).

At the evidentiary hearing on the motion to compel, Agent Block testified that OAG agents observed that **IP address belonging to Davis was active on the peer-to-peer file sharing network eMule 25 times during the year 2015.** The investigation determined that on those occasions, the file sharing had qualities that were indicative of child pornography (R. at 39a).

SUMMARY OF ARGUMENT

As an initial matter, the factual premises inherent in the wording of the question presented for review as defined by Davis and adopted by this Court are inaccurate and misleading. Contrary to those premises, the record does not reflect whether Davis has memorized and/or documented in writing the password at issue. In addition, the trial court order under review was not limited to production of the password via oral communication; it was much more broadly worded to encompass production of the password verbally or in writing. These erroneous assumptions contained within the question presented for review are significant, for if the password was voluntarily recorded in a writing by Davis prior to the entry of the order, it would not, as a matter of law, be subject to the constitutional right against self-incrimination.

This Court should dismiss as waived Davis' claim that Article I, Section 9 of the Pennsylvania Constitution provides broader protection against self-incrimination than the Fifth Amendment to the United States Constitution with regard to compelled acts of production because the first time Davis articulated this claim was in this Court and he took a contrary position in the courts below. Davis failed to preserve this claim for appellate

review and therefore is prohibited as a matter of law from obtaining review of the claim by this Court.

The Court should hold that the Forgone Conclusion Doctrine applies to render Davis' compelled act of producing the password to his encrypted lawfully-seized computer non-testimonial and therefore not violative of the Fifth Amendment to the United States Constitution or Article I, Section 9 of the Pennsylvania Constitution. The testimonial significance of Davis' production of the password would be communication that a password to his computer exists, that he possesses and controls the password, and that the password will unlock the computer. The Commonwealth already has this information – which links Davis to the computer -- through sources unrelated to the production of the password. Therefore, Davis' compliance with the trial court's order will add nothing of testimonial value to the sum total of the government's investigation, rendering the production of the password more akin to the provision of a handwriting exemplar than to the provision of testimony. Pursuant to well-established United States Supreme Court Fifth Amendment jurisprudence, because the information that will be conveyed by production of the password is non-testimonial, the constitutional right against self-incrimination is not implicated.

ARGUMENT

I. INTRODUCTION

The dispute between the parties involves the following straightforward and undisputed facts: (1) after determining that there is probable cause to believe that Davis' computer contains evidence of criminality in the form of child pornography, a judge signed a warrant authorizing OAG agents to search for, seize, and search through that computer; (2) upon seizing the computer, OAG agents determined that the computer's contents are inaccessible because of an encryption software installed by Davis which prevents the agents from conducting their judicially-authorized search; (3) the encryption software requires the entry of a password to enable access; (4) following a waiver of his *Miranda* rights, Davis voluntarily informed OAG agents that there is a password that will decrypt the computer which is in his sole possession and control and which he will not turn over to the government because the computer contains evidence of criminality on his part; (5) Davis voluntarily informed OAG agents that he enjoys child pornography, has been convicted for possessing child pornography in the past, and believes child pornography is harmless

and should be legal in the Commonwealth of Pennsylvania; and (6) independent of Davis' voluntary statements to the agents, the OAG's criminal investigation yielded evidence demonstrating the existence of a specific video depicting child pornography on Davis' computer and the use of Davis' computer on 25 occasions over a year's period of time to send and receive electronic files highly indicative of the possession and distribution of child pornography.[10]

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[10] This Court has stated the following about child pornography, citing United States Supreme Court opinions:

> [T]he High Court has clearly and laudably articulated that the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."
>
> Part of the reason enormous efforts are made to stamp out the production of child pornography are the pernicious secondary effects of child pornography. The High Court has expressed that because child pornography permanently records a victim's abuse, the "pornography's continued existence causes the child victims continuing harm by haunting the children in years to come." Moreover, the role that child pornography plays in harming children can go beyond the victimization of the children in the images. The High Court has recognized that "evidence suggests that pedophiles use child pornography to seduce other children into sexual activity," noting that the Attorney General's Commission on Pornography, for example, states that "[c]hild pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be

In other words, notwithstanding the fact that the OAG does not at this time possess the password to access the computer, it already has credible, admissible evidence that: (1) a password exists that will decrypt the computer; (2) Davis has sole possession of and control over that password; and (3) Davis is capable of surrendering the password to the government which would in turn allow OAG agents to access the computer's contents and conduct their authorized search. **Davis' act of providing the password to OAG agents would communicate nothing more than these facts which are already known by the Commonwealth through other sources.** The act of production ordered by the trial court would provide no information about the location or contents of the computer or the circumstances surrounding the existence of the contents of the computer.

Thus, the "testimony" inherent in Davis' production of the password -- the existence, location, and authenticity of the password at issue -- is an absolute foregone conclusion and Davis' compliance with the trial court's order will add nothing of communicative value to the sum total of the

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> convinced by viewing other children having 'fun' participating in the activity."

Commonwealth v. Baker, 78 A3d 1044, 1051 (Pa. 2013) (citations omitted).

government's information in this case. The Commonwealth does not seek the password to establish or prove a connection between Davis, his computer, and its contents because it already has that information. It merely seeks surrender of the password in order to open the lock that Davis has placed on the computer to avoid a lawful search.[11]

The question before the Court is a question of first impression: whether the Forgone Conclusion Doctrine established by the United States Supreme Court in its Fifth Amendment jurisprudence governing the compelled production of documents applies in the context of compelled production of digital passwords. Although this Court has not yet addressed the issue, courts in other states and in the federal judiciary have done so. All published decisions are in agreement that the federal Supreme Court has unambiguously held that the Fifth Amendment right against self-incrimination is not violated when the information communicated via a compelled act of production is already known by the government through independent means. On the question of the FDC's application to digital passwords, however, there is some divergence of decision.

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[11] Davis has not challenged the legal validity of the underlying search warrant.

Resolution of the instant dispute involves the balancing of two critically important values: the people's vital interest in effective law enforcement and every man's evidence on the one hand and the suspect's right not to be forced to incriminate himself on the other. The Commonwealth most respectfully requests that this Court adhere to the sound reasoning contained in the United States Supreme Court's FCD decisions and follow the lead of its sister courts in Florida and Massachusetts as well as the United States Court of Appeals for the Third Circuit. Those courts, as well as others, have determined that application of the FCD to digital passwords is both logical and sound. That is, they have concluded that compelling a person to decrypt his seized encrypted computer for law enforcement officers or to provide the password to enable law enforcement officers to decrypt the computer does not infringe on the person's privilege against self-incrimination when the record establishes that the information communicated by the compelled act is already known by the government. **In such instances, the information provided by the password holder via the contents of his mind has no testimonial significance.**

II. THIS COURT SHOULD DISMISS AS WAIVED DAVIS' CLAIM THAT ARTICLE I, SECTION 9 OF THE PENNSYLVANIA CONSTITUTION PROVIDES BROADER PROTECTION AGAINST SELF-INCRIMINATION THAN THE FIFTH AMENDMENT TO THE UNITED STATED CONSTITUTION WITH REGARD TO COMPELLED ACTS OF PRODUCTION BECAUSE THE FIRST TIME HE ARTICULATED IT WAS IN THIS COURT AND HE TOOK A CONTRARY POSITION IN THE COURTS BELOW.

A. Davis Did Not Preserve His Claim for Appellate Review.

Pennsylvania Rule of Appellate Procedure 302(a) states unequivocally that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." This Court has applied this rule consistently. *See, e.g., Piper Group v. Bedminster Twp. Bd. Of Supervisors*, 30 A.3d 1083, 1097 (Pa. 2011) (issue raised on appeal was deemed waived because it was not raised in the lower court); *Steiner v. Markel*, 968 A.2d 1253, 1256 (Pa. 2009) ("This Court has consistently held that an appellate court cannot reverse a trial court judgment on a basis that was not properly raised and preserved by the parties"); *In re Nader*, 858 A.2d 1167, 1181 n. 18 (Pa. 2004) (Supreme Court refused to consider issue raised on appeal because issue had not been raised in the court below); *Commonwealth v. Mouzon*, 812 A.2d 617, 624 (Pa. 2002) ("issues not raised before the lower court are waived and cannot be raised for the first time on appeal"); *Dollar Bank v. Swartz*, 657 A.2d 1242,

1245 (Pa. 1995) (failure of appellant to raise and preserve issue in lower court resulted in waiver of issue on appeal); *Foster v. Mutual Fire, Marine & Inland Insur. Co.*, 614 A.2d 1086 (Pa. 1992), *cert. denied*, 506 U.S. 1080 (1993) (issues on appeal not raised in court below were waived pursuant to Pa.R.A.P. 302(a)).

Moreover, where an issue is raised in the Supreme Court, it must have been raised in both the trial court and the intermediate appellate court in order to be preserved for review. *See, e.g., Commonwealth v. Neiman*, 84 A.3d 603, 610 n. 27 (Pa. 2013); *Stimmler v. Chestnut Hill Hospital*, 981 A.2d 145, 153 n. 7 (Pa. 2009); *Commonwealth v. Diodoro*, 970 A.2d 1100, 1104 n. 5 (Pa. 2009); *Lynch v. W.C.A.B. (Teledyne Vasco)*, 680 A.2d 847 (Pa. 1996). In the words of this Court, "Even if a claim is properly presented to the trial court or the sentencing court, if it is abandoned in the Superior Court, then this Court will not pass on it…Failure to pursue an issue on appeal is just as effective a forfeiture as is the failure to initially raise the issue." *Commonwealth v. Piper*, 328 A.2d 845, 847 n. 5 (Pa. 1974).

The fact that an unpreserved appellate claim involves a matter of constitutional law does not alter the application of this rule. "Matters not raised in, or considered by, the court below cannot be invoked on appeal

even though they involve constitutional questions." *Altman v. Ryan*, 257 A.2d 583, 585 (Pa. 1969) (emphasis added); *Montgomery County Bar Assoc. v. Rinalducci*, 197 A. 924, 925 (Pa. 1938); *see Smith v. Yellow Cab Co.*, 135 A. 858 (Pa. 1927) (constitutional questions or issues not raised in the lower court will not be reviewed; constitutional questions cannot be first raised on appeal).

In light of the foregoing governing legal authority, Davis' claim that Article I, Section 9 of the Pennsylvania Constitution provides broader protection against self-incrimination than the Fifth Amendment of the United States Constitution with regard to compelled acts of production must be deemed waived and dismissed because, as set forth in detail in the "procedural history" section of this brief and as reflected in the reproduced record and certified record on appeal, **Davis did not articulate this claim in either the trial court or the Superior Court.** He failed to preserve the issue of an independent state constitutional basis for overruling the trial court's order because he failed to articulate the claim until he filed his petition for allowance of appeal in this Court.[12]

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[12] The Commonwealth specifically argued in its Superior Court appellee's brief at 20 n. 6 that Davis had waived any separate Pennsylvania

Not only this, but as noted *supra*, **Davis explicitly articulated in the trial court a position contrary to the one advanced in his brief filed with this Court: "The Pennsylvania Supreme Court has determined that these privileges are governed by the same standard"** (R. at 50a). This explains why Davis did not articulate an independent state constitutional argument in any of his filings in the trial court or Superior Court. Davis literally agreed with the Commonwealth's view of the governing legal standards throughout the trial and intermediate appellate review proceedings.

Were this Court to consider the new argument about Article I, Section 9 that was never raised, developed, or litigated below, it would not only be in stark derogation of this Court's bedrock and long-standing principle set forth in Rule 302(a) requiring the preservation of issues for appeal, but would raise serious questions about this Court's commitment to consistent and fair application of the governing law and rules of procedure. The argument has been waived.

Constitutional argument and cited *Commonwealth v. Beshore*, 916 A.2d 1128, 1140 (Pa. Super. 2007) (failure to develop adequate argument in appellate brief results in waiver of the claim; court will not develop argument for a party).

B. <u>Davis' New Claim Has No Merit.</u>[13]

Assuming, *arguendo*, that the claim has not been waived, it is meritless. This Court has repeatedly held that the privilege against self-incrimination provided by Article I, Section 9 of the state Constitution is -- with the exception of the expanded right to reputation provided by the state Constitution -- coextensive with the protection afforded under the Fifth Amendment of the federal Constitution. *See, e.g., Commonwealth v. Knoble*, 42 A.3d 976 ,979 n. 2 (Pa. 2012); *Commonwealth v. Sartin,* 751 A.2d 1140, 1142 n. 5 (Pa. 2000); *Commonwealth v. Arroyo*, 23 A.2d 162, 166-167 (Pa. 1999); *Commonwealth v. Morely*, 681 A.2d 1254, 1258 (Pa. 1996); *Commonwealth v. Bolus*, 680 A.2d 839, 844 (Pa. 1996); *Commonwealth v. Swinehart*, 664 A.2d 957, 962-965 (Pa. 1995); *Commonwealth v. Marra*, 594 A.2d 646 (Pa. 1991); *Commonwealth v. Hawthorne*, 236 A.2d 519, 520 (Pa. 1968). **In the words of this Court, "because we have determined that Article I, Section 9 tracks the Fifth Amendment in the context of the self-incrimination clause, the analysis herein proceeds exclusively under the Fifth Amendment."** *Sartin,*

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[13] The argument in this subsection of the brief is presented because of the possibility that the Court will not dismiss the independent state constitutional claim as waived. In doing this, the Commonwealth does not abandon its argument that Davis has waived this new claim on appeal.

751 A.2d at 1142 n. 5. **"In all instances other than the protection given by our Commonwealth's Constitution to reputation, the provision in Article I, § 9 against self-incrimination tracks its federal counterpart."** *Morley*, 681 A.2d at 1257.

As noted by Davis in his brief, the Court's consistent application of this rule of "coextensivity" has not been 100 percent. In *Commonwealth v. Molina*, 104 A.3d 430 (Pa. 2014), this Court acknowledged that it has generally followed the lead of the United States Supreme Court when construing the privilege against self-incrimination in Article I, Section 9, but nonetheless held that the state provision provides stronger protection than the Fifth Amendment when a prosecutor seeks to use a defendant's silence as evidence of substantive guilt. **The Court initially stated that it based its decision on the state constitutional provision rather than the federal one because "the status of federal jurisprudence [on the issue in dispute] is uncertain."** *Molina*, 104 A.3d at 432. It also cited "the primacy of the Declaration of Rights to Pennsylvania's charter." *Id.* at 452. In addition, the Court referenced the fact that on several previous occasions it has rendered

decisions that veered from the normally-applied standard.[14] *See also D'Elia v. Pennsylvania Crime Commission,* 555 A.2d 864 (Pa. 1989) (holding that state constitutional privilege against self-incrimination goes beyond the protection afforded by the Fifth Amendment in the context of use and derivative use immunity); *but see Morely, 681 A.2d at 1258 (D'Elia* is "strictly limited to its facts which involved testimony being compelled from a witness before the Crime Commission....").

Still, the vast majority of this Court's pronouncements on the subject have been consistent with the language quoted *supra* from *Sartin,* 751 A.2d 1140 and *Morely*, 681 A.2d 1254. In *Swinehart*, 664 A.2d 957, this Court characterized the state provision as broader than the federal one due to the right to reputation contained in Article I, Section 9 but also stated that: (1) "[a] comparison of the actual language in Article I, Section 9 and the Fifth

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[14] Specifically, the Court cited *Commonwealth v. Triplett*, 341 A.2d 62 (Pa. 1975) (plurality), *Swinehart,* 664 A2d 957; and *Commonwealth v. Turner*, 454 A.2d 537 (Pa. 1982). *Triplett* was a plurality decision with no binding effect that was abrogated by a subsequent constitutional amendment. *Swinehart* held that the state constitutional protection of reputation rendered Article I, Section 9 broader than the Fifth Amendment. *Turner* held that reference to post-arrest, pre-*Miranda* silence violates Article I, Section 9 even though it does not violate the Fifth Amendment.

Amendment does not reveal any major differences in the description of the privilege against self-incrimination within the two Constitutions; (2) there is "a strong sentiment within this Commonwealth…in favor of interpreting the constitutional privilege against self-incrimination similarly to the same privilege contained in the Fifth Amendment of the United States Constitution;" (3) "the historical review of our caselaw interpreting Article I, Section 9 shows that we have generally followed the lead of the United States Supreme Court on this issue;" and (4) on the issue of "transactional immunity vs. use and derivative use immunity," the state constitutional guarantee demands no more than the federal constitutional guarantee.

Recognizing that he is asking this Court to abandon its long-standing precedent applying the same standard to the Fifth Amendment and Article I, Section 9 in virtually all contexts, Davis presents the Court with an *Edmunds* analysis that is thoughtful but self-serving and ultimately unpersuasive. This Court has on multiple occasions in various contexts exhaustively examined the relationship between the state and federal constitutional provisions at issue and conducted an *Edmunds* analysis on the subject. *See, e.g., Molina,* 104 A.3d 430; *Swinehart*, 664 A.2d 957. To the extent that the Court will consider the merits of Davis' *Edmunds* argument in spite

of the clear waiver of the issue on appeal, the Commonwealth respectfully requests this Court to adhere to the principles and guidance on the subject set forth at length and with great care and soundness in *Swinehart*. On that basis, the Court should reject Davis' invitation to diverge from federal jurisprudence construing the Fifth Amendment in this case.

IV. THIS COURT SHOULD HOLD THAT THE FORGONE CONCLUSION DOCTRINE APPLIES TO RENDER DAVIS' COMPELLED ACT OF PRODUCING THE PASSWORD TO HIS COMPUTER NON-TESTIMONIAL AND THEREFORE NOT VIOLATIVE OF THE FIFTH AMENDMENT OR ARTICLE I, SECTION 9 BECAUSE THE RECORD ESTABLISHES THAT THE COMMONWEALTH IS ALREADY INDEPENDENTLY AWARE OF THE INFORMATION THAT WILL BE COMMUNICATED BY DAVIS' PRODUCTION OF THE PASSWORD.

A. The Applicable Standard of Review

An appellate court's review of an issue involving a constitutional right is a question of law for which the court's standard of review is *de novo* and its scope of review is plenary. *Commonwealth v. Baldwin*, 58 A.3d 754, 762 (2012).

B. <u>The Governing Law</u>[15]

1. <u>The Fifth Amendment Privilege Against Self-Incrimination</u>

The Fifth Amendment to the United States Constitution provides in pertinent part that "[n]o person ... shall be compelled in any criminal case to be a witness against himself[.]" Amend. V, U.S. Const.[16] This privilege against self-incrimination "protects a person only against being incriminated by his own compelled testimonial communications." *Doe v. United States,* 487 U.S. 201, 207 (1988) (quoting *Fisher v. United States*, 425 U.S. 391, 409 (1976)); *see also Schmerber v. California*, 384 U.S. 757, 763 (1966) (the Fifth Amendment privilege protects an accused from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature). "The word 'witness' in the constitutional text

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[15] As noted *supra*, it is the Commonwealth's position that application of standard governing the privilege provided by the Fifth Amendment also applies to the same privilege established by Article I, Section 9.

[16] This Court has previously stated that the minor differences between the language in the state and federal constitutional provisions that have been pointed out by Davis are inconsequential: "A comparison of the actual language in Article I, Section 9 and the Fifth Amendment does not reveal any major differences in the description of the privilege against self-incrimination within the two Constitutions." *Swinehart,* 664 A2d at 962.

limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character." *United States v. Hubbell*, 530 U.S. 27, 34 (2000). "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe*, 487 U.S. at 210 (footnote omitted).

In order for a person to properly invoke his/her Fifth Amendment privilege, he/she needs to establish three things: (1) compulsion, (2) a testimonial communication or act, and (3) incrimination. *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177, 190-191 (2004). Once an individual has invoked his/her privilege against self-incrimination, it becomes the duty of the trial court to determine whether there is a reasonable basis for the assertion of the privilege and whether the privilege has been invoked in good faith. *Id.*

2. **Compelled Acts of Production**

The Fifth Amendment privilege against self-incrimination has been held to apply not only to verbal and written communications but also to the production of documents, usually in response to a subpoena or summons, because the act of production itself may involve the incidental

communication of incriminatory information. This is known as the Act of Production Doctrine. *See Fisher*, 425 U.S. at 410. By contrast, it is firmly established that **when a person is compelled to produce physical evidence that contains no testimonial value, the self-incrimination privilege does not apply.** *See Schmerber v. California*, 384 U.S. 757, 763-764 (1966); *Gilbert v. California*, 388 U.S. 263-266-267 (1967); *United States v. Wade*, 388 US 218, 222 (1967); *United States v. Dionisio*, 410 U.S. 1, 6-7 (1973); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *see also Doe v. United States*, 487 U.S. 201 (1988) (listing cases in which the Court has ruled that certain acts, though incriminating, lack a testimonial nature and are therefore not within the privilege). With *Schmerber* and its progeny, the High Court made clear that the following acts of production contain no information of testimonial or communicative value: handwriting exemplars, fingerprints, voice exemplars, dental impressions, urine samples, sobriety tests, gunshot residues, and hair samples.

3. <u>The Forgone Conclusion Doctrine</u>

a. <u>United State Supreme Court Holdings</u>

In *Fisher v. United States*, 425 U.S. 391 (1976), the United States Supreme Court:

> concluded that the act of producing subpoenaed documents could have "communicative aspects of its own, wholly aside from the contents of the papers produced." Compliance with a subpoena "tacitly concedes the existence of the papers demanded and their possession or control by the [subpoenaed party]." It also indicates that party's "belief that the papers are those described in the subpoena," and in some instances this could constitute authentication of the papers. **These three elements of production—acknowledgment of existence, acknowledgment of possession or control, and potential authentication by identification—are clearly compelled, but whether they are "testimonial" and incriminating,"... depend[s] upon the "facts and circumstances of particular cases or classes thereof."**

Testimonial Character and the Forgone Conclusion Standard, 3 Crim. Proc. § 813(a) at 1 (4th ed.) (emphasis added) (footnotes omitted) (citation omitted).[17]

In *Fisher*, the Court provided the basic analytical structure for determining whether the elements of an act of production are testimonial in character under the Fifth Amendment. It concluded that there is no basis for holding "testimonial" the implicit admissions as to the existence and possession of a taxpayer's tax records provided through production of his accountant's workpapers, stating:

> It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers belong to the

[17] The authors of this publication are Wayne R. LaFave, Jerold H. Israel, Nancy J. King, and Orin S. Kerr.

> accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client. **Surely the Government is in no way relying on the "truthtelling" of the taxpayer to prove the existence of or his access to the documents [i.e. the item sought by the government]. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers.** Under these circumstances by enforcement of the summons "no constitutional rights are touched. **The question is not of testimony but of surrender**.

Fisher, 425 at 411 (emphasis added).

In that case, the Court was not dealing with a traditional form of testimony, but with something quite different: a physical act of producing something material that may or may not have incidental communicative aspects:

> The Court cited by analogy its rulings holding the Fifth Amendment inapplicable to a court order requiring an accused to submit a handwriting sample. Incidental to the performance of that act, the Court noted, the accused necessarily "admits his ability to write and impliedly asserts that the exemplar is his writing." But the government obviously is not seeking this information—the "first would be a near truism and the latter self-evident"—and therefore **"nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege." Where the existence and possession of the documents to be produced are a "foregone conclusion," the act of production similarly "adds little or nothing to the sum total of the government's information" and therefore is no more testimonial than other compelled physical acts. The government in such a case obviously is not seeking the**

> **assertions of the subpoenaed party as to the facts of existence and possession, and his incidental communication as to those facts, inherent in the physical act that the government had the authority to compel, therefore does not rise to the level of compelled "testimony."**

Testimonial Character and the Forgone Conclusion Standard, 3 Crim. Proc. § 813(a) at 2 (emphasis added) (footnotes omitted).

In *United States v. Doe*, 465 U.S. 605 (1988) ("*Doe I*"), the federal Supreme Court made clear that the FCD applies to the element of authentication of the items sought as well as to their existence and possession. Specifically, it noted that the government was "not foreclosed from rebutting respondent's [Fifth Amendment] claim by producing evidence that possession, existence, and authentication were a 'forgone conclusion.'" *Doe*, 465 U.S. at 614 n. 13.

In *Doe v. United States*, 487 U.S. 201 (1988) ("*Doe II*"), the Supreme Court made clear the communicative aspect of a compelled act only rises to the level of "testimony" for Fifth Amendment purposes **when the government's objective is to seek to have the actor, through the act of production, "relate a factual assertion or disclose information."** *Doe*, 487 U.S. 209-210 (emphasis added). **The Court flatly rejected the petitioner's argument that**

the Fifth Amendment prohibits the government from ever compelling an accused to assist in his prosecution. *Id.* at 213.

More specifically, in *Doe II* the Court:

> held that a court order requiring an individual to sign a form directing any foreign bank to release the records of any account he might have at that bank did not compel "testimony" for Fifth Amendment purposes. **This was so since the government did not seek to use the signed form itself as a factual assertion of the individual (although it would use the documents that might be produced by the bank in response to the signed directive).** Indeed, the form was carefully drafted so that the signing party noted that he was acting under court order and did not acknowledge the existence of any account in any particular bank. It did not indicate whether the requested documents existed, and offered no assistance to the government in later establishing the authenticity of any records produced by the bank. Thus, **while the signed form did constitute a communication, it did not constitute "testimony." The government was not relying on the "truth-telling" of the directive, but simply requiring the petitioner to engage in the act of producing that directive...**

Testimonial Character and the Forgone Conclusion Standard, 3 Crim. Proc. § 813(a) at 2 (emphasis added) (footnotes omitted). "To allow the privilege to be claimed simply because the required act incidentally provided information, even though the government did not seek that information, would be to make every compelled act a testimonial communication, contrary to the *Schmerber* rule." *Id.*

In *United States v. Hubbell*, 530 U.S. 27 (2000), the Court revisited this issue in the context of a government demand for a large volume of unidentified documents containing numerous broad categories. In that instance, the government lacked reasonably particular knowledge about the existence, possession, and authenticity of the documents it sought. Although the government had immunized the defendant from evidence of the act of production itself (as opposed to the documents that it led to), the Court refused to apply the FCD to the specific facts of that case:

> Whatever the scope of this "foregone conclusion" rationale, the facts of this case plainly fall outside of it. **While in *Fisher* the Government already knew that the documents were in the attorneys' possession and could independently confirm their existence and authenticity through the accountants who created them, here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent...**
>
> * * *
>
> Given our conclusion that respondent's act of production had a testimonial aspect, at least with respect to the existence and location of the documents sought by the Government's subpoena [of which the government had no independent knowledge], respondent could not be compelled to produce those documents without first receiving a grant of immunity under § 6003...

Hubbell, 530 U.S. at 44-45 (emphasis added). With this decision, the Court made clear that the FCD applies when the government already knows about the existence, possession, and authenticity of the items sought, but does not so apply when the government lacks this knowledge. Only with such knowledge on the part of the state is the information communicated by the actor's compelled act deemed to lack testimonial significance under the Fifth Amendment.

b. Application of the Doctrine by the Lower Federal Courts and State Appellate Courts in the Context of Encrypted Devices

Neither the United States Supreme Court nor this Court has addressed the application of the FCD to compelled production of decryption keys and passwords to computers.[18] The courts that have addressed the Fifth Amendment implications of such compelled productions have largely applied the FCD. The vast majority of the courts have found it logical and sound to extend the FCD to cases such as the instant one and have held that compelled production of a digital password or compelled decryption of a

[18] The Commonwealth has been unable to locate a published decision in which this Court addressed the FCD even outside the context of passwords to digital devices.

digital device is non-testimonial and therefore does not violate the right against self-incrimination. *See, e.g., United States v. Apple Macpro Computer,* 851 F.3d 238, 247 (3rd Cir. 2017); *United States v. Bright*, 596 F.3d 683, 692 (9th Cir. 2010); *United States v. Gavegnano*, 305 Fed.Appx. 954 (4th Cir. 2009); *State v. Stahl*, 206 So. 3d 124, 131 (Fla. 2nd DCA 2016); *Commonwealth v. Gelfgatt*, 11 N.E.3d 605, 612 (Ma. 2014); *Sec. & Exch. Comm'n v. Huang*, 2015 WL 5611644, *1 (E.D.Pa. Sept. 23, 2015); *United States v. Fricosu*, 841 F.Supp.2d 1232, 1235 (D. Col. 2012); *In re Grand Jury Subpoena to Boucher*, 2009 WL 424718, *2–3 (D.Vt. Feb. 19, 2009); *Commonwealth v. Baust*, 89 Va. Cir. 267 (Va. Cir. Ct. 2014); *see also United States v. Ponds*, 454 F.3d 313, 324 (D.C. Cir. 2006) (in a documents case, stating that the threshold question for the Court under the FCD is whether the government has "establish[ed] its [pre-subpoena] knowledge of the existence, possession, and authenticity of the subpoenaed documents with 'reasonable particularity' " such that "the communication inherent in the act of production can be considered a foregone conclusion").

Several courts have held to the contrary. *See, e.g., In re Grand Jury Subpoena Duces Tecum,* 670 F.3d 1335 (11th Cir. 2012); *United States v. Kirschner*, 823 F.Supp.2d 665, 669 (E.D. Mich. 2010).[19]

In the words of the Third Circuit Court of Appeals, the FCD:

> acts as an exception to the otherwise applicable act-of-production doctrine. Under this rule, the Fifth Amendment does not protect an act of production when any potentially testimonial component of the act of production – such as the existence, custody, and authenticity of the evidence – is a "forgone conclusion" that "adds little or nothing to the sum total of the Government's information." For the rule to apply, the Government must be able to describe with reasonable particularity" the documents or evidence it seeks to compel.

Apple Macpro Computer, 851 F.3d at 247 (citations omitted) (citing *Fisher v. United States*, 425 U.S. 391, 411 (1976) and *U.S. v. Hubbell*, 530 U.S. 27, 30 (2000)).

In the words of the Supreme Judicial Court of Massachusetts:

> The "foregone conclusion" exception to the Fifth Amendment privilege against self-incrimination provides that an act of production does not involve testimonial communication **where the facts conveyed already are known to the government,** such that the individual "adds little or nothing to the sum total of the Government's information." **For the**

[19] Although Davis relies greatly in his brief on the analysis of the Indiana intermediate appellate court decision in *Seo v. State*, 109 N.E.3d 418 (Ind. Ct. App. 2018), **that decision has been vacated and transferred to the Indiana Supreme Court for review.** *See Seo v. State*, -- N.E. 3d – (Ind. Dec. 6, 2018).

> **exception to apply, the government must establish its knowledge of (1) the existence of the evidence demanded; (2) the possession or control of that evidence by the defendant; and (3) the authenticity of the evidence. In those instances when the government produces evidence to satisfy the "foregone conclusion" exception, "no constitutional rights are touched. The question is not of testimony but of surrender."** In essence, under the "foregone conclusion" exception to the Fifth Amendment privilege, the act of production does not compel a defendant to be a witness against himself.

Gelfgatt, 11 N.E.3d at 614-615 (citations omitted) (citing *Fisher v. United States*, 425 U.S. 391, 411 (1976) and *U.S. v. Hubbell*, 530 U.S. 27, 30 (2000)) (emphasis added).

In the words of Florida's intermediate appellate court:

> However, even the testimonial communication implicit in the act of production does not rise "to the level of testimony within the protection of the Fifth Amendment" **where the State has established, through independent means, the existence, possession, and authenticity of the documents.** That is, by implicitly admitting the existence of the evidence requested and that it is in the accused's possession, the accused "adds little or nothing to the sum total of the Government's information"; the information provided is a foregone conclusion. "In essence, under the 'foregone conclusion' exception to the Fifth Amendment privilege, the act of production does not compel a defendant to be a witness against himself."
>
> **In order for the foregone conclusion doctrine to apply, the State must show with reasonable particularity that, at the time it sought the act of production, it already knew the evidence sought existed, the evidence was in the possession of the accused, and the evidence was authentic.** Although the

> State need not have "perfect knowledge" of the requested evidence, it "must know, and not merely infer," that the evidence exists, is under the control of defendant, and is authentic. Where the foregone conclusion exception applies, "[t]he question is not of testimony but of surrender."

Stahl, 206 So.3d at 135-136 (citations omitted) (emphasis added).

C. <u>This Court Should Affirm the Determinations of the Superior Court and the Trial Court Finding No Violation of the Right Against Self-Incrimination.</u>

In this litigation, the Commonwealth seeks only the password to unlock Davis' lawfully-seized computer which a judge has found probably contains child pornography. The order compelling its production – which simply effectuates the execution of the search warrant already authorized -- does not require Davis to communicate any information about the computer or the computer's contents or about his connection to them. By Davis' own admission, the password is simply a set of 64 characters. In and of itself, it communicates nothing of significance. It is akin to the signed bank authorization form in the *Doe II* case which the United States Supreme Court found to be **non-testimonial and separate and distinct from any incriminating information that the authorization form might lead the government to.** *See Doe*, 487 U.S. 201 (while the signed form did constitute a communication, it did not constitute "testimony;" government was not

relying on the "truth-telling" of the item produced, but simply requiring the petitioner to engage in the act of producing that item).

The Commonwealth does not seek from the compelled production any evidence that links Davis to the computer in question; it already has that evidence from other sources, namely: (1) Davis' numerous voluntary statements linking himself to the computer and to child pornography on the computer; and (2) the information gleaned by OAG agents from the investigation into the online peer-to-peer electronic file-sharing network known as "eMule." To the extent that Davis' compliance with the order would communicate a nexus between himself and the computer, that information is already known by the government; it is a foregone conclusion that renders Davis' communication non-testimonial.[20]

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[20] The courts have used slightly different language to describe this principle. Some courts interpret the fact that the government has independent knowledge of the information that would be conveyed by compliance with the order for production to render the accused simply not a witness against himself. *See Stahl*, 206 So.3d at 135-136. Other courts interpret the same fact to mean that any communicative aspect of the compelled act of production is non-testimonial in nature. *See Gelfgatt*, 11 N.E.3d at 614-615 (closely tracking the analysis in *Fisher* and its progeny). The Third Circuit has simply stated that "the Fifth Amendment does not protect an act of production when any potentially testimonial component of the act of production – such as the existence, custody, and authenticity of the evidence – is a 'forgone

It is true that the order under review involves compulsion and requires Davis to perform a physical act that might be incriminating insofar as the password may turn out to be a link in a chain of evidence that could be used against him in a future prosecution if additional child pornography is found on the computer. However, as noted *supra,* this is simply not enough to constitute a proper invocation by Davis of his rights under the Fifth Amendment and Article I, Section 9. In addition to establishing compulsion and incrimination, Davis must establish that the compelled act is "testimonial" in nature **as that term has been defined by the United States Supreme Court.** This he cannot do.

Boiled down to its essence, Davis' argument is that the right against self-incrimination forbids the government from taking a thought or memory from an individual's mind and using it against him in a criminal prosecution. Respectfully, this is an oversimplification of the issue. Among other things, it ignores: (1) the fact that the privilege applies when **the compelled act** (in this case surrendering the password) – not the contents of

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conclusion' that 'adds little or nothing to the sum total of the Government's information.' *See Apple Macpro Computer,* 851 F.3d at 247.

the individual's mind – has testimonial significance to the government, *see Fisher*, 425 U.S. at 411; (2) the precedent holding that when the communicative element of a compelled act of production adds little to nothing to the sum total of the government's information, that act is no more testimonial than compelled physical acts such as the provision of fingerprints and handwriting examplars, *see Id.;* (3) the precedent making clear that the government can, in certain instances, require an individual to assist it in his/her prosecution, *see Doe*, 487 U.S. at 209-210; and (4) the distinction between the government seeking surrender of an item (in this case the password) and the government seeking information of testimonial significance, *see Id.*

Because the Commonwealth has established on the record that it already is aware that the password exists, that Davis possesses and controls that password, and that the password is authentic, the trial court's order requiring Davis to provide OAG agents with the password constituted a proper application of the Fifth Amendment and Article I, Section 9. Davis should not be permitted to utilize the Fifth Amendment and Article I, Section 9 to insulate himself from a lawful and legitimate law enforcement search that serves the public's vital interest in effective law enforcement. *See, e.g.,*

Roviaro v. United States, 353 U.S. 53, 59 (1957) (public interest in effective law enforcement); *Commonwealth v. Payne*, 656 A.2d 77, 80-81 (Pa. 1994) (same).

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Honorable Court: (1) hold that Davis has waived his claim that Article I, Section 9 of the Pennsylvania Constitution provides broader protection from self-incrimination than the Fifth Amendment to the United States Constitution; (2) acknowledge that the Order in question requires production of the password either by spoken word or by production of a writing which may or may not have been voluntarily prepared prior to the Order's entry; (3) hold that if Davis, prior to the Order in question, voluntarily prepared a writing that documents the password, Davis cannot as a matter of law invoke his right against self-incrimination; and (4) hold that the Forgone Conclusion Doctrine applies to render Davis' compelled act of producing the password to his encrypted, lawfully-seized computer non-testimonial and therefore not violative of the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

As required by Pa.R.A.P. 2135(d), I certify that the Brief for Appellee contains less than 14,000 words, excluding the parts of the Brief for Appellee that are exempted by Pa.R.A.P. 2135(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 7, 2019.

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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