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56 MAP 2018

IN THE SUPREME COURT OF PENNSYLVANIA

No. 56 MAP 2018

COMMONWEALTH OF PENNSYLVANIA

Appellee,

v.

JOSEPH J. DAVIS

Appellant.

REPLY BRIEF FOR APPELLANT JOSEPH DAVIS

Appeal from 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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INTRODUCTION

The order of the Court of Common Pleas, as affirmed by the Superior Court, requires that appellant Joseph Davis "supply the Commonwealth" with the password to his encrypted computer. R.56a. Mr. Davis shows in his opening brief that this order cannot be squared with the privilege against self-incrimination, as protected by either the Fifth Amendment to the Constitution of the United States or Section 9 of Article One of the Constitution of Pennsylvania. The Commonwealth's brief does not succeed in showing otherwise. Accordingly, the order appealed from must be reversed.

ARGUMENT IN REPLY

I. Under Any Scenario, the Trial Court's Order Seeks to Compel Mr. Davis to Incriminate Himself in Violation of the Fifth Amendment.

The order that Mr. Davis "supply" a password does not expressly state how he is required to do so—orally, in writing, by physical act, or by production of a document. But the record of this case shows, and this Court's grant of allowance of appeal presumes, that what is at issue is the oral recitation of a memorized password. Regardless of format, however, that order demands what the Fifth Amendment promises cannot be compelled.

A. The Commonwealth cannot compel Davis to disclose the password orally or in writing, and it has failed to identify any legal authority to the contrary.

The trial court order purporting to compel Mr. Davis to "supply" the Commonwealth with any passwords to the computer in question, R.56a, would

force him to reveal memorized information or otherwise "tell the truth" about the password. That order is unprecedented and unconstitutional. It is also incredibly dangerous to the liberty of Pennsylvanians. *See* Opening Br. at 14–17; *see also* EFF Amicus Br. 24–27.[1]

Contrary to the Commonwealth's assertion that "the vast majority of the courts have [sic] found it logical and sound to extend the ['foregone conclusion' rationale[2]] to cases such as the instant one," Commonwealth Br. at 43, no court has ever held that the rationale can be applied to orders that would compel oral or written testimony. Prohibiting compelled testimony is a core Fifth Amendment right and subject to its maximum protection. No court has ever held that the "foregone conclusion" rationale can justify the state's compulsion of expressions of a witness's mind, memory, or truth-telling.

Courts have only ever inquired whether the communicative aspects of an *act of production* could nevertheless be compelled as a foregone conclusion. Some lower courts have held that the rationale could overcome the privilege against self-

[1] The record in this case shows that at some point Davis memorized the password to the seized device. Davis told investigators that "only he knows the password," R.39a. He further stated he could not remember the password. R.41a. He told the interrogating agent that "he would die in jail before he could ever remember the password." R.41a.

[2] The Commonwealth's brief refers to this highly limited theory as the "Foregone [or sometimes, 'Forgone'] Conclusion Doctrine," with capital letters and abbreviates it "FCD." But in fact there is no such well-settled "doctrine." As this Commonwealth concedes, this Court has never so much as alluded to it, in more than 40 years since the U.S. Supreme Court first made reference to that rarely-invoked rationale.

incrimination if the government already knows everything that an act of production—in almost all cases an act of production of business and other financial records—would reveal. *See* Opening Br. at 27.

The Commonwealth's position is radical. *See Goldsmith v. Superior Court*, 152 Cal. App. 3d 76, 87 n.12 (1984) (citing *Commonwealth v. Hughes*, 404 N.E.2d 1239, 1245 (Mass. 1980)). As the *Hughes* court wrote:

> The Commonwealth . . . says that the evidence is unworthy of Fifth Amendment protection because it merely enhances other persuasive evidence obtained without the defendant's help. The Commonwealth's argument is indeed curious. It is as if we were asked to rule that a confession could be coerced from an accused as soon as the government announced (or was able to show) that [in] a future trial it could produce enough independent evidence to get past a motion for a directed verdict of acquittal.

Hughes, 404 N.E.2d at 1245.

If a criminal defendant cannot, consistent with the Fifth Amendment, be compelled to answer a question regarding the date of his birthday even when the interrogators knew the answer, *see Pennsylvania v. Muniz*, 496 U.S. 582, 600 (1990), Mr. Davis cannot be compelled to recite to law enforcement memorized sequences of numbers, letters, or other characters that he mentally associates with a particular digital device. This is especially true because, unlike in *Muniz*, investigators do not know the password. To hold otherwise would be to invite pure evidentiary spectacles—foreign to American law and better associated with the Star Chamber—in which the government could force individuals to answer incriminating questions or to confess criminal guilt merely because the answers were to some degree "already known by the government," Commonwealth Br. at

48. That is a chilling proposition, rejected in the case law, and unsupported in the Commonwealth's brief. This Court should reject it wholesale here.

B. The Commonwealth cannot compel Mr. Davis to type in a password, because that would rely on the truthful use of the contents of his mind.

While a stretch, the trial court's order compelling Mr. Davis to "supply" the password could be interpreted to require that Davis enter the password into the computer at issue, rather than disclose it to prosecutors orally or in writing. When it comes to the Fifth Amendment, though, the distinction is one without a difference.[3]

Tellingly, while the amici supporting the Commonwealth (several other states' Attorneys General) ask this Court to affirm, *see* States Amici Br. at 6, they do not appear to endorse the Commonwealth's legal argument concerning compelled oral or written testimony. Rather, amici repeatedly train their legal argument on "entering" the password—not "supply[ing]" it, R.56a—and directly "unlocking" a device. *See* States Amici Br. at 13, 15, 17. Mr. Davis addressed that

[3] It is irrelevant whether the Commonwealth learns the passcode from Mr. Davis compelled response. The Fifth Amendment "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution *or could lead to other evidence that might be so used*." *Kastigar v. United States*, 406 U.S. 441, 445 (1972) (emphasis added); *accord Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("The privilege . . . embraces those [answers] which would furnish a link in the chain of evidence needed to prosecute the claimant . . . ."). Thus, if entering the passcode could lead to incriminating information on the computer, that communication is covered by the Fifth Amendment privilege.

question extensively in his opening brief and briefly responds to that point here. *See* Opening Br. at 17–24.

The Constitution protects non-verbal acts that communicate the contents of an individual's mind. *Curcio v. United States*, 354 U.S. 118 (1957); *Doe v. United States*, 487 U.S. 201, 210 n.9 (1988) ("*Doe I*"); *Braswell v. United States*, 487 U.S. 99, 126 (1988) (Kennedy, J., dissenting) ("Physical acts will constitute testimony if they probe the state of mind, memory, perception, or cognition of the witness."). The Fifth Amendment applies regardless of whether those communications involve verbal or non-verbal conduct. *Muniz*, 496 U.S. at 595 n.9. "A nod or headshake is as much a 'testimonial' or 'communicative' act in this sense as are spoken words." *Schmerber v. California*, 384 U.S. 757, 761 n.5 (1966).

These kinds of communicative acts cannot be compelled even if the Commonwealth already knows the information that the act would reveal. A murder defendant cannot be forced to nod "yes" even if the prosecution has evidence he killed the victim. She cannot be forced to turn over the gun or drugs even if investigators can prove she was formerly in possession. *See, e.g.*, *Muniz*, 496 U.S. at 595; *Hughes*, 404 N.E.2d at 1245. A witness cannot be compelled to disclose or enter a combination to a lock. *See Doe I*, 487 U.S. at 210 n.9 (making a comparison between being compelled to surrender a key to a strongbox containing incriminating documents, which would not be a testimonial act, and being compelled to reveal the combination to a wall safe, which would be a testimonial act); *United States v. Green*, 272 F.3d 748, 753 (5th Cir. 2001) ("There is no

serious question but that Green's actions in disclosing the locations and opening the combination locks of the cases containing firearms were testimonial and communicative in nature."). Nor can Davis be compelled to disclose or enter a password into a computer. The Fifth Amendment does not allow it, and the "foregone conclusion" theory simply does not apply.

Ultimately, the Commonwealth correctly summarizes Davis's argument: the right against self-incrimination forbids the government from compelling either testimony or a communicative act which is dependent on a defendant's thoughts, memories, or other cognition against him in a criminal case. Commonwealth Br. at 49. To avoid this clear legal conclusion based on precedent and reason, the Commonwealth's argument depends on its speculative assertion that perhaps Mr. Davis may have written the password down somewhere. Appellant addresses that contention in the next section of this brief.

There is nothing oversimplified, unclear or equivocal about the law here. The Fifth Amendment prohibits the Commonwealth from compelling Davis to reveal the contents of his mind through word or deed. So long as the password resides only in Davis's memory, it is categorically beyond the Commonwealth's reach.

C. The Commonwealth's purely hypothetical scenario, in which Mr. Davis has written the password down somewhere, nevertheless depends on Davis's truthful, constitutionally protected testimony.

Apparently recognizing the lack of support for its radical position, the Commonwealth imagines a situation in which this case presents different facts, which it believes are potentially more favorable to it. *See* Commonwealth Br. at 1 n.1. Taking issue with Mr. Davis's formulation of the question presented, the Commonwealth suggests that it would have a better argument if Mr. Davis had "voluntarily recorded [the password] in a writing." *Id*. Yet in the same breath, the Commonwealth concedes that "the record . . . does not reveal whether Davis has . . . documented in writing th[e] password." *Id.*; *accord* State Amici Br. 19. Since there are no facts in the record that support this hypothetical situation, and this Court did not grant allocatur to consider it, the Opening Brief did not consider this possibility in depth. Appellant now does so here.

The Commonwealth has had nearly four years, since October 2015, to prosecute its case against Davis. During that time, investigators obtained a warrant,[4] thoroughly searched Davis's home, and interviewed him. Only now—with this case before Pennsylvania's highest court on an important issue of constitutional law—does the Commonwealth ask this Court to imagine a critical fact not in evidence to be true and to base its decision on that hypothesized fact.

[4] Warrants are based on probable cause, a showing far below the "reasonable particularity" standard necessary for a finding of "foregone conclusion," even where that theory applies.

Even if the Court did consider this supposition, this avenue of argument makes the Commonwealth's case worse, not better. The only way the Commonwealth could find out whether Davis wrote down the correct password to this computer is by compelling Mr. Davis to testify against himself. Mr. Davis would have to inform the Commonwealth, either by word or by deed, whether he has actual or constructive possession of a piece of paper with the password on it. By handing the paper over to the Commonwealth, he would be communicating to investigators by that act of disclosure his belief that, "this is an accurate recording of the password that corresponds to the seized computer." Given that he is in custody, he likely would have to tell the Commonwealth where that imagined piece of paper is. Some of these facts could be intuited from the act of production. Some might require Davis to directly give witness. Regardless, the Fifth Amendment prohibits compelling such testimony.

Should it exist, Davis cannot be compelled to produce an incriminating piece of paper that the Commonwealth knows nothing about. For example, in *Hughes*, 404 N.E.2d 1239, the police had reason to believe that there was a gun belonging to the defendant, but it did not know where the gun was. Nevertheless, the Fifth Amendment applied: prosecutors may not obtain court-ordered disclosure to relieve itself of "its ignorance or uncertainty by trying to get itself 'informed of knowledge the defendant possesses.'" *Id*. at 1244 (citing *People ex rel. Bowman v. Woodward*, 63 Ill.2d 382, 387 (1976)); *see also Goldsmith*, 152 Cal. App. 3d at 87 n.12 (despite testimony from officer that defendant had possession of gun used in

the offense, defendant could not be compelled to turn over weapon because revealing its whereabouts would reveal personal knowledge possessed by defendant and not otherwise available to prosecution).

As the Commonwealth's brief recognizes, these facts are not remotely "foregone conclusions"—indeed, they are simply unknown. The "foregone conclusion" exception applies only where the Commonwealth can show with "reasonable particularity" that it "already [knows] of the materials, thereby making any testimonial aspect a 'foregone conclusion.'" *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012) ("*Doe II*"). By contrast, where an act of production implies a statement of fact the Commonwealth does not already know, compelling that act would violate the Fifth Amendment. *See United States v. Hubbell*, 530 U.S. 27, 45 (2000) (no foregone conclusion where government did not have "any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent"). Here, the Commonwealth does not know whether a written-down password exists nor where it might be. The assertion is pure conjecture.

What the Commonwealth seeks here is nothing like signing an authorization form as in *Doe I*, 487 U.S. 201. *See* Commonwealth Br. at 47. In *Doe I*, the government forced the target to sign a document that did not admit the existence of any bank accounts, but permitted the disclosure of records if any existed. All the court required of the witness was a signature. Here, however, the Commonwealth

wants to force Davis to tell the truth. Disclosing that he knows the location of a Post-It note with the password on it, for example, very much requires Davis to testify: "I wrote this. This is the password. It is on a Post-It and the Post-It is in my upper left desk drawer." If any of these things are true—and there's no reason to believe they are—the Commonwealth would only know by forcing Davis to bear witness against himself.

If Davis did not write the password down, will he nevertheless be held in contempt of court for refusing to produce it, in light of the Commonwealth's suspicions? Or must Mr. Davis be forced to testify that he never wrote the password down in order to avoid contempt of court? The Commonwealth's maneuver makes even more clear than ever that it seeks to put Davis to "the cruel trilemma of self-accusation, perjury or contempt," *Doe I*, 487 U.S. at 212—precisely the choice the Fifth Amendment privilege against self-incrimination is designed to prohibit. *See* Opening Br. 12–13.

D. The "foregone conclusion" rationale has no application here.

The Commonwealth's entire case depends on an unprecedented misapplication of the narrow and controversial rationale it glorifies as the "Foregone Conclusion Doctrine" or "FCD." That effort fails.

As Mr. Davis has already explained, the "foregone conclusion" rationale is an exceedingly narrow one that the Supreme Court has relied on just once to overcome an individual's claim of Fifth Amendment privilege. *See* Opening Br.

24–29 (discussing *Fisher v. United States*, 425 U.S. 391 (1976)); *see also* EFF Amicus Br. at 5–10. Those arguments are not repeated here.

In rebuttal, the Commonwealth claims that Davis's argument is oversimplified for four reasons. Commonwealth Br. at 49–50. The Commonwealth's effort to distinguish this case from strong precedent is unavailing. Unquestionably, the Fifth Amendment privilege applies both to words or acts that would reveal the witness's thoughts, memories or cognition, as well as to compelled acts which would disclose or otherwise rely on the contents of the individual's mind. If the compelled act cannot be accomplished without revealing information the witness knows, the act is testimonial and the Fifth Amendment applies. *See Fisher*, 425 U.S. at 410. Reciting a string of characters or producing a paper with the password written on it—if one exists—would reveal "personal knowledge possessed by defendant and not otherwise available to the prosecution." *Goldsmith*, 152 Cal. App. 3d at 85. What the Commonwealth asks for is "testimony"—by word or by deed—that would reveal information Davis may have, but the prosecution does not. Even if there were a written documentation of the password, acts of production can, and usually do, reveal at least some information of testimonial significance. *See, e.g.*, *Fisher*, 425 U.S. at 410 ("The act of producing evidence in response to a subpoena . . . has communicative aspects of its own, wholly aside from the contents of the papers produced."). That is the case here, so the Fifth Amendment prohibits the Commonwealth from compelling that act. Even if the "foregone conclusion" rationale did apply here, the Commonwealth

cannot demonstrate that it knows with reasonable particularity what files are on Mr. Davis's computer. The Commonwealth does not address the argument that it must demonstrate knowledge of the existence, location, ownership, and authenticity of the device *and also identify with reasonable particularity what files it will find stored there*. *See* Opening Br. at 29–33. Rather than argue against that position, the Commonwealth merely recites large block quotes from cases that Mr. Davis shows were wrongly decided. *See* Commonwealth Br. at 46–47 (quoting, *inter alia*, *State v. Stahl*, 206 So.3d 124, 135–36 (Fla. 2d Dist. Ct. App. 2016)).[5] While Mr. Davis acknowledged that courts have divided on this question, he explained why the courts that have endorsed his position—which comprise the majority of courts to rule on it—are, in fact, correct. *See* Opening Br. 30–33 (discussing, *inter alia*, *United States v. Apple MacPro Computer*, 851 F.3d 238, 248 (3d Cir. 2017); *Doe II*, 670 F.3d at 1349).[6] As he explained, the compelled entry of a password to decrypt a digital device would lead to an unknown number of potentially incriminating files, and such compelled assistance would

[5] The Commonwealth's reliance on *Stahl* omits any discussion whatsoever of another Florida case—from the same judicial level—that reaches the opposition conclusion—even though Mr. Davis cited it multiple times in his opening brief. *See G.A.Q.L. v. State*, 257 So.3d 1058 (Fla. 4th Dist. Ct. App. 2018).

[6] The Commonwealth notes that since Davis filed his opening brief, the decision in *Seo v. State*, 109 N.E.3d 418 (Ind. Ct. App. 2018), has been transferred to the Indiana Supreme Court for review. *See* Commonwealth Br. at 45 n.19. But while the *Seo* opinion has indeed been vacated pending review by the higher court, as that court's procedures require, Davis relied not upon its *result as precedent* but upon its *reasoning as persuasive*. *See, e.g.*, Opening Br. at 55 (calling the *Seo* opinion "the most thoughtful and thorough" of the judicial precedent in other jurisdictions on this topic).

impermissibly force the accused to "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman*, 341 U.S. at 486. Further, Davis explained why the Commonwealth's evidence in this case falls far short of being a "foregone conclusion," because it knows little about the files Davis's compelled assistance will lead them to. *See* Opening Br. 31–33.

E. Contrary to the claims of Amici State Governments, finding Fifth Amendment protection here is neither novel nor troubling.

The Commonwealth's amici argue that there are various "troubling consequences [from] the defense's analysis," but those arguments are either mistaken or irrelevant to the Fifth Amendment question presented here. States Amici Br. at 6.

First, encryption does not "drastically alter the balance of power between investigators and criminals." *Id.* at 10. To the contrary, encryption protects "the right of each individual to a private enclave where he may lead a private life." EFF Amicus Brief at 25 (citing *Doe*, 487 U.S. at 212–13; *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)). Today the technology we use in our daily lives creates long-lasting records about deeply personal things. Email and chat applications capture our conversations with friends, family, and coworkers. Our cellphones create logs of where we've been, where we are going, and whom we are with. *See United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."). Our Internet searching

and browsing is a window into our most personal interests and curiosities. Participating in modern society requires that one expose private information to communications providers—and from there potentially to advertisers, marketers, identity thieves, blackmailers, stalkers, spies, and more.

Encryption is designed to protect individuals from these threats. As the Eleventh Circuit said, encryption is not simply a tool for criminals. *Cf. Doe II*, 670 F.3d at 1347 ("Just as a vault is capable of storing mountains of incriminating documents, that alone does not mean that it contains incriminating documents, or anything at all."). It is true that encryption may impose obstacles to law enforcement in particular cases. So do window shades. That is no reason to up-end longstanding constitutional protections.

Second, amici warn that enforcing the Fifth Amendment privilege here would "render law enforcement often incapable of lawfully accessing relevant evidence." States Amici Br. at 10. It is sometimes true that constitutional protections interfere with law enforcement investigations. Our Bill of Rights accepts that this will sometimes be the case in order to strike a necessary balance between individual civil liberties and government power. Indeed, that is one of the Constitution's principal functions. The question is not whether the privilege can interfere with otherwise authorized access to evidence—rather, the question is *when*, and Davis has shown that one of those instances is this case.

Further, in making their argument, amici rely heavily on a forthcoming article by Orin S. Kerr, a former federal computer crimes prosecutor who now

teaches at George Washington University. *See* Orin Kerr, *Compelled Encryption and the Privilege Against Self-Incrimination*, — Tex. L. Rev. — (forthcoming 2019). But Professor Kerr asserts that if a user employs encryption, not as a gateway to an entire device but to encrypt particular individual files on the device, the "foregone conclusion" rationale will not entitle law enforcement to access the files. As he states, in such situations, "mere knowledge of a password would not be enough." *Id.* at 21. Thus, while amici suggest Mr. Davis's position would have a devastating policy consequence for law enforcement, their own position does not get them much farther.

Finally, amici suggest that Mr. Davis's legal argument "could result in less privacy, not more," States Amici Br. at 20. Amici seem to believe that protecting Fifth Amendment rights will provoke the public into adopting "draconian anti-privacy legislation." *Id*. at 23. This speculation presumes that the public would view the courts' protection of constitutional rights as a threat, rather than a desired end. Moreover, it assumes that courts like this one are called upon to weigh policy debates like legislatures, rather than to decide questions of law based on text and precedent. This is a democracy, and if elected representatives want to change the law, they are free to do so within the bounds of what state and federal constitutions allow, as later determined by the courts.

In any case, the position Mr. Davis takes is based on longstanding, well-settled legal authority against which the public has not rebelled. To the contrary, the Commonwealth comes to this Court asking to vastly *expand* an *exception* to a

longstanding constitutional right in order to greenlight unprecedented investigatory techniques at the cost of individual privacy and security. If anything, that is the position that the Court should evaluate with extreme caution—not Davis's request to enforce the U.S. and Pennsylvania Constitutions.

For these reasons, nothing in the Commonwealth's brief casts doubt on the arguments advanced in appellant's opening brief. Reversal is required on federal constitutional grounds.

II. The Commonwealth Fails to Rebut Appellant's Showing that Article I, Section 9 of the Pennsylvania Constitution Independently Invalidates the Pretrial Order Compelling Oral Disclosure of a Computer Password.

This Court granted allowance of appeal in the present case on a two-part question—that is, whether *either* the Fifth Amendment privilege under the U.S. Constitution's Bill of Rights *or* the Article 9 privilege under the Pennsylvania Declaration of Rights, Pa. Const., Art. I, § 9, invalidates the trial court's pretrial disclosure order. The Commonwealth, as appellee, now seeks to avoid any decision on the state constitutional law issue. Commonwealth Br. at 26–34. Indeed, the appellee's brief never engages on the merits with Mr. Davis's 24-page exposition of that point. *See* Opening Br. at 33–56. The issue, however, is ripe for decision, is of substantial importance (as this Court recognized in granting allowance of appeal), has been thoroughly briefed by the appellant, and should be reached and settled. For the reasons set forth in detail in the appellant's opening

brief, this Court should reverse the order appealed from on the basis of the state Constitution.

A. Appellant Davis did not waive his state constitutional law argument.

In an attempt to prevent this Court from deciding a critical part of the question on which the instant appeal was allowed, the Commonwealth argues that "Davis'[s] 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 . . . ." Commonwealth Br. at 28. The appellee bases this assertion on two points: a claim that Mr. Davis did not fully develop the independent state constitutional law argument in the court below, and a misquotation of the defendant's memorandum of law filed in the trial court. The appellee seeks support for this position in Pa.R.App.P. 302(a) and in a string-cited list of this Court's cases. Commonwealth Br. at 26–28. Nothing cited by the appellee, however, actually supports its position. This Court should proceed to decide both aspects of the question on which it chose to allow this appeal.

Rule 302(a) provides that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." But this rule has no direct relevance to the Commonwealth's present argument. The appellee's contention does not appear to be that the state constitutional law claim was not "raised" in either of the courts below, but rather that it was not *developed* there, or at least not developed to the same extent and with the same sophistication that it has been

presented to this Court. In other words, the Commonwealth's suggestion is not that Mr. Davis failed to raise the *issue*, but that his public defender did not advance all the same *arguments in support* of that issue.[7] The latter can sometimes be a legitimate concern, but it is not the subject of Rule 302(a)'s bright line restriction. *See, e.g.*, *Villani v. Seibert*, 639 Pa. 58, 77, 159 A.3d 478, 489–90 (2017) (while appellant's arguments in support of constitutionality of a statute "could have been sharper from the outset," those points would not be deemed waived).

Ironically, the Commonwealth has itself waived its waiver argument. The time to call attention to supposed defects in the adequacy of presentation of an issue in a petition for allowance of appeal is in a party's response to the petition. Yet here, the Commonwealth filed a letter with the Prothonotary on March 14, 2018, stating that "the Commonwealth of Pennsylvania will not be filing an answer to the Petition for Allowance of Appeal. This should not, in any way, be construed as a concurrence in the facts, arguments, or conclusions raised in the petition." The second sentence of this letter refers only to the merits of the petition's arguments. There was no suggestion that the Commonwealth felt that the question presented in

[7] This Court is well aware of the inadequate resources available to the Luzerne County Public Defender's Office. See *Kuren v. Luzerne Cty*, 637 Pa. 33, 146 A.3d 715 (2016). It would be ironic, indeed, to penalize Mr. Davis now, simply because his public defender allocated those limited resources to litigating the multiple issues in the case, including but not limited to this one. Now on appeal, Davis has *pro bono*, volunteer co-counsel who are able to focus on and present the constitutional arguments on his behalf more fully.

the petition did not properly arise on the facts or history of the case, or that any issue advanced there had been waived in the lower courts.

Under these circumstances, to protect the integrity of this Court's processes and to ensure that its time is not wasted with the improvident granting of petitions, the Commonwealth's present waiver argument should itself be deemed waived. *See* Pa.R.App.P. 1116(a) (any "answer [to a petition for allowance of appeal] … shall set forth any procedural, substantive or other argument or ground why the order involved should not be reviewed by the Supreme Court"); *Commonwealth v. Mouzon*, 571 Pa. 419, 430 n.10, 812 A.2d 617, 624 n.10 (2002) (opinion announcing judgment; not disputed by concurring or dissenting Justices) ("[T]o the extent the Commonwealth now argues that Appellant filed his 1925(b) statement in an untimely manner, the Commonwealth only asserted this issue *after* this Court granted allocatur. The Commonwealth . . . did not even file a brief in opposition to Appellant's petition for allowance of appeal. . . . Thus, the Commonwealth has waived any objections it may have had . . . ."). The Commonwealth's objection in the present case likewise comes too late and should not now be entertained.

Moreover, not one of the twelve cases cited by the Commonwealth in support of its argument on this point, *see* Commonwealth Br. at 26–27, so far as Mr. Davis is able to ascertain, involved a determination by this Court that the very issue on which allowance of appeal had been granted had been waived by the appellant. *See, e.g.*, *Commonwealth v. Neiman*, 624 Pa. 53, 65 n.27 84 A.3d 603, 610 n.27 (2013) (issue waived because it was *both* not raised below and not

"within the scope of our grant of allocatur"); *Stimmler v. Chestnut Hill Hospital*, 602 Pa. 539, 552 n.7, 981 A.2d 145, 153 n.7 (2009). In some of the cases, either the question was whether some point was "fairly comprised" within the question presented for decision,[8] or the line of argument at issue was moot because relief was granted on another basis,[9] or the case involved a complete failure by the appellant to brief one of several issues on which allocatur was granted.[10] None of the cases supports the Commonwealth's present contention in Mr. Davis's case.

Mr. Davis did in fact claim, both in his response to the prosecutor's underlying motion in the trial court, *see* R.49a, 50a, and in the Superior Court below, *see* Appellant's Super. Ct. Br. at 3, 7, 9, 10, that the compulsory disclosure order being sought by the Commonwealth would violate his rights against self-incrimination under both the state and federal constitutions. Both of the courts below recognized that a state constitutional law question was presented; neither found it waived. See Appx. A at 10 n.6[11]; Appx. B at 7.

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[8] *E.g.*, *Piper Grp. v. Bedminster Twp. Bd. of Supervisors*, 612 Pa. 282, 306 n.23, 30 A.3d 1083, 1097 n.23 (2011); *Steiner v. Markel*, 600 Pa. 515, 520, 968 A.2d 1253, 1256 (2009).

[9] E.g., *In re Nader*, 580 Pa. 22, 46 n.18, 858 A.2d 1167, 1181 n.18 (2004).

[10] E.g., *Commonwealth v. Beshore*, 2007 PA Super 19, 916 A.2d 1128, 1140 (2007).

[11] The Commonwealth contended in Superior Court that Mr. Davis had waived his state constitutional claim on account of insufficient briefing, *See* Commonwealth Br. at 28–29 n.12, but the court below rejected that argument. The Superior Court instead addressed the point on the merits, holding (erroneously) that the scope of state constitutional protection is *per se* coextensive with that of the federal. Appx. A at 10 n.6.

The Commonwealth now contends that Mr. Davis made a concession in the trial court that expressly waived any argument that the state constitutional protection is broader, in the present context, than the federal. Commonwealth Br. at 29. But that claim is based on a misrepresentation of the record. What Mr. Davis's post-hearing memorandum said is this: "(Citing Commonwealth brief), the Pennsylvania Supreme Court has determined that these privileges are governed by the same standard." R.50a (parenthetical in original). In referencing this passage in its brief, the Commonwealth omits the introductory parenthetical and puts its own capital T on the first "the." Mr. Davis's attorney was merely *reciting* the Commonwealth's position on the issue—not *agreeing* with it.

As acknowledged in appellant's opening brief (at 36) and in Section II.B of this Reply, this Court has sometimes asserted broadly that the two different constitutional privileges are co-extensive. But in other cases, the Court has acknowledged that its dictum was overstated. The Commonwealth's attempt to impute a waiver from Mr. Davis's counsel's acknowledgment of this Court's statements, which misquotes what counsel wrote by omitting the introductory words, therefore fails.

To be sure, the separate Article I, Section 9 question did not take center stage in either of the courts below. Nevertheless, Mr. Davis did raise the issue, it is properly preserved for appeal, this Court has granted review, and the task now is to decide an important constitutional question. This Court should reject the Commonwealth's waiver arguments and proceed to the merits. *See Commonwealth v.*

Williams, 636 Pa. 105, 145 n.23, 141 A.3d 440, 464 n.23 (2016) (finding waiver of Commonwealth's waiver argument).

B. The protections of the Article I, Section 9 privilege are not fully co-extensive with those of the federal Fifth Amendment.

As set forth in the Petition for Allowance of Appeal, *see* Petition at 14–16, and then in Mr. Davis's opening brief (at 36–38, this Court has several times determined that one or another self-incrimination claim fares no better under Article I, Section 9 than it does under the Fifth Amendment. Some of those opinions contain language, which can easily be quoted out of context, that seems to suggest as a general matter that the protections of our state's Constitution in this connection never exceed those of the federal. Indeed, the court below cited one of those statements (a 2012 footnote) as its entire discussion of the state constitutional law issue in this case. *See* Appx. A at 10 n.6. This Court's most recent pronouncement on the subject, from 2015, says the same. *See Commonwealth v. Cooley*, 632 Pa. 119, 129 n.8, 118 A.3d 370, 375 n.8 (2015).

But the Commonwealth cannot and does not dispute that this Court has also several times found that in one context or another that the Pennsylvania Constitution *does* afford greater self-incrimination protection than does the federal Fifth Amendment. *See* Opening Br. at 37–38; Commonwealth Br. at 31–32. Indeed, in *Commonwealth v. Molina*, 628 Pa. 465, 104 A.3d 430 (2014), this Court acknowledged that prior generalizations (like the one relied on by the Court below) are "overstate[d]." *Id.* at 443. And even if it is true that "the vast majority of this

Court's" holdings on aspects of the self-incrimination privilege have not veered from their federal counterparts, Commonwealth Br. at 32, that would be no reason at all to refrain from a serious examination of whether the particular issue presented in Mr. Davis's case is one that calls for an independent analysis and result.

Appellant's brief most certainly does not "ask[] this Court to abandon its long-standing precedent," Commonwealth Br. at 33, in any context at all. Mr. Davis asks only for an open-minded examination of the question presented here. The need for such analysis—and the problem created by this Court's prior, overbroad statements of some of its holdings—were highlighted in the Petition for Allowance of Appeal. Presumably, by granting allowance, this Court has already agreed to address the question fully.

Turning to the merits of that part of the question presented, the Commonwealth's brief has virtually nothing to say. Surely, an appellee cannot thwart this Court's review by refusing to brief the merits. For the reasons elaborated in Mr. Davis's opening brief, regardless of how the federal issue is resolved, this Court should reach and decide the Article I, Section 9 question, and should do so in his favor.

C. Article I, Section 9 of the Pennsylvania Constitution invalidates the Order of the trial court and requires reversal of the Superior Court.

The only argument on the merits of the state constitutional law issue that the appellee offers is this: "[T]he 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" *Commonwealth v. Swinehart*, 541 Pa. 500, 664 A.2d 957 (1995). Commonwealth Br. at 34. Yet in *Swinehart*, this Court concluded "that Article I, Section 9 is, *in fact, more expansive than the Fifth Amendment*; it is not, however, so expansive that the privilege against self-incrimination would require greater protection than that provided within the [Commonwealth's own Immunity] Act." 664 A.2d at 969 (emphasis added). On that basis, this Court decided that the state Constitution did not require transactional rather than use-and-fruits immunity to supplant a proper claim of privilege. But the particular holding of *Swinehart* is not what makes that precedent important here. What is key is that this Court's *Edmunds* analysis in *Swinehart*, like that offered by appellant Davis in his opening brief, led to the conclusion that the two different constitutional provisions are not always coextensive. At the same time, much of the broader language in *Swinehart*, on which the Commonwealth would now apparently rely, is inconsistent with the analysis in *Molina*, almost 20 years later, acknowledging the danger of overstating the general congruity of the two protections.

The Commonwealth's brief graciously acknowledges that Mr. Davis's *Edmunds* analysis is "thoughtful." Commonwealth Br. at 33. The Commonwealth suggests further, however, that Mr. Davis's analysis is "self-serving," *id*., which is a peculiar criticism in an adversary system, absent any specific critique of any of our arguments. The same is true of the accusation that Mr. Davis's arguments are

"ultimately unpersuasive," *id*., since the Commonwealth fails to explain at all how this is so.

This Court has never endorsed the U.S. Supreme Court's late-Twentieth Century innovation in Fifth Amendment analysis—contrary to more than a hundred years of precedent—by ruling that compelled disclosure of pre-existing documents does not violate the self-incrimination privilege. *See* Opening Br. at 44–45 (citing, *e.g*., *Boyle v. Smithman*, 146 Pa. 255, 274, 23 A. 397, 398 (1892)).[12] Yet it is the U.S. Supreme Court's historically unmoored holding in its 1976 *Fisher* case that promulgates the "act of production" theory, which in turn leads to the "foregone conclusion" rationale (misapplied here to the content of the defendant's own mind, rather than to document production), which alone could support the lower court's order. Not once in the ensuing four decades has this Court endorsed or employed that theory.

[12] Regrettably, in the editing process, over 65 words were inadvertently dropped from footnote 19 of Mr. Davis's opening brief on this point. *See* Opening Br. at 45. The quotation contained in the parenthetical following our citation of *Entick v. Carrington* (1765) is not from that case. The intended but omitted quotation from *Entick* reads: "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty." Following this parenthetical should have appeared the words: "*See Boyd v. United States*, 116 U.S. 616, 630 (1886)." It is from *Boyd* that the quotation in footnote 19 about the "forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence" is taken.

The text of Article I, Section 9 predates the Fifth Amendment by 25 years. It is different in a critical respect (focusing on "giv[ing] evidence" rather than on "be[ing] a witness"), and its history is independent and distinct. *See* Opening Br. at 39–51. Other states are exploring independent constitutional approaches to the issue at hand; this Court should as well. *See* Opening Br. at 51–55.

The Commonwealth ultimately concedes that our own Constitution protects against compulsory self-incrimination differently in various respects than the federal. *See* Commonwealth Br. at 31. For all the reasons elaborated in Mr. Davis's opening brief, those broader protections should lead to reversal in the present context. The words of Article I, Section 9, understood in light of their history and supporting policies, cannot tolerate a pretrial judicial order, directed to a criminal defendant, to disclose the memorized password to his own computer. The judgment of the Superior Court must be reversed not only because that court misapplied the Fifth Amendment, but also because it failed to uphold and enforce the protections of Pennsylvania's own Declaration of Rights.

CONCLUSION

The judgment of the Superior Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify, pursuant to Pa.R.A.P. 2135, that this brief does not exceed 7,000 words, to wit, no more than 6,974 words, including footnotes.

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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.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties at the addresses and in the manner listed below:

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