No. 17-____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

Matthew Vaughn Diamond, *Petitioner,*

v.

State of Minnesota, *Respondent.*

Petition for a Writ of Certiorari to the
Supreme Court of the State of Minnesota

PETITION FOR A WRIT OF CERTIORARI

STEVEN P. RUSSETT
Assistant State Public Defender

Office of the Minnesota Appellate Public Defender
540 Fairview Avenue North, Suite 300
St. Paul, Minnesota 55104
(651) 201-6700
Email: Steven.Russett@pubdef.state.mn.us

Counsel of Record for Petitioner

QUESTION PRESENTED

Does compelling a criminal defendant to identify which of their fingerprints unlocks a cellphone containing incriminating evidence that police can place near the scene of a crime violate the defendant's Fifth Amendment right against compelled self-incrimination?

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MATTHEW VAUGHN DIAMOND,
PETITIONER,

V.

STATE OF MINNESOTA,
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PETITION FOR WRIT OF CERTIORARI

Petitioner Matthew Vaughn Diamond respectfully prays that a writ of certiorari issue to review the judgment of the Minnesota Supreme Court.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court, the highest state court to review the merits, is reported at 905 N.W.2d 870 and attached as Appendix A. The opinion of the Minnesota Court of Appeals is reported at 890 N.W.2d 143 and attached as Appendix B. The district court's written order directing Diamond to provide police the fingerprint they needed to open the cellphone is attached as Appendix C.

JURISDICTION

The Minnesota Supreme Court issued its decision on January 17, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V: "No person * * * shall be compelled in any criminal case to be a witness against himself[.]"

U.S. Const. amend. XIV: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

On October 30, 2014, Marie Heine discovered someone had burglarized her home. A few days later, police arrested petitioner Matthew Diamond and when booking him into jail confiscated a Samsung Galaxy 5 cellphone from him.

Police obtained a search warrant authorizing them to search the cellphone for evidence connecting Diamond to the burglary of Heine's home. When police tried to search the cellphone they discovered a fingerprint was needed to unlock it.

After Diamond was charged with the burglary, the state asked the district court to compel Diamond to provide his "finger and/or thumb print to unlock" the cellphone. Diamond objected on Fifth Amendment grounds. The district court granted the state's motion and ordered Diamond "to provide a fingerprint or thumbprint as deemed necessary by the [police] to unlock his seized phone." (App. C4.)

Diamond refused to comply with the court order. The district court then held Diamond in civil contempt and told him he could purge himself of contempt "by simply complying with the order." (App. D6.) The court ordered Diamond to "put your thumbprint on [the phone]" and warned if he did not the court would find him in criminal

contempt and allow the police to "take the necessary steps to obtain your thumbprint on this phone." (App. D7.)

Diamond told the district court he believed the court's order was unconstitutional but he was "not going to be physically opposing the imprint of his thumb on the cell phone." (App. D8-D9.) The following then transpired on the record:

> THE COURT: * * *. So at this time, detective, based on Mr. Diamond's acquiescence to the order, if you wish to bring the phone up, we will keep the record open at this time as he complies with the lawful order.
>
> MR. IVY [THE PROSECUTOR]: Your Honor, we're not sure if it's an index finger or a thumb.
>
> THE COURT: Take whatever samples you need.
>
> (WHEREPON, a brief recess was taken.)
>
> THE DEFENDANT: What finger do you want?
>
> DETECTIVE NELSON: The one that unlocks it.
>
> DETECTIVE HUGHES: The one that unlocks it.
>
> THE COURT: We're off the record at this point.
>
> THE COURT: We're back on the record.
>
> Mr. Ivy, did you verify that the officers have what they need with respect to the thumbprint?
>
> MR. IVY: I believe so.

(App. D10.)

The police discovered texts and call logs on the cellphone implicating Diamond in the burglary, and the state introduced that evidence at Diamond's jury trial. The state also introduced cellphone tower records showing that the cellphone had been used in the

area of the burglary. The jury convicted Diamond of the burglary and the district court sentenced him to prison.

Diamond appealed his conviction and argued that the district court's order compelling him to produce the fingerprint that unlocked the cellphone violated his Fifth Amendment right against compelled self-incrimination. The Minnesota Court of Appeals denied the appeal concluding, as a constitutional issue of first impression, that compelling Diamond to provide a fingerprint to unlock a cellphone was not a "testimonial communication" for Fifth Amendment purposes. *State v. Diamond*, 890 N.W.2d 143, 151 (Minn. App. 2017). The Minnesota Supreme Court granted Diamond's petition for further review and affirmed on the same grounds. *State v. Diamond*, 905 N.W.2d 870, 872, 878 (Minn. 2018).

REASONS FOR GRANTING THE PETITION

The Writ Should Issue Because This Case Presents An Important Federal Constitutional Issue Of First Impression That Should Be Decided By This Court, And Because The Minnesota Supreme Court Decided The Issue In A Way That Conflicts With Prior Decisions Of This Court.

This case presents an issue of first impression: Whether compelling a criminal defendant to identify which of their fingerprints unlocks a cellphone containing incriminating evidence and that police can place near the scene of a crime violate the defendant's Fifth Amendment right against compelled self-incrimination? This issue is an important federal constitutional issue of immediate national import that should be decided by this Court. And further review by this Court is imperative because the

reasoning underlying the decision of the Minnesota Supreme Court, the first state high court to resolve this issue, is flawed and conflicts with this Court's Fifth Amendment jurisprudence.

Smartphones can be a source of "valuable incriminating information about dangerous criminals" and are subject to being searched by police with a search warrant. *Riley v. California*, 134 S. Ct. 2473, 2493 (2014). But the vast majority of smartphones are now "inaccessible to authorized government searches" without a passcode or a fingerprint. *See* Kristen M. Jacobsen, *Game of Phones, Data Isn't Coming: Modern Mobile Operating System Encryption And Its Chilling Effect on Law Enforcement*, 85 Geo. Wash. L. Rev. 566, 574 (Mar. 2017). Whether smartphone users under criminal investigation can be compelled by courts to produce the passcode or fingerprint needed to access a smartphone, then, will have ramifications for cellphone users and law enforcement agencies nationwide.

This Court is the final arbitrator of federal constitutional issues and the resolution of constitutional questions of such national import should not be left to the high court of a single state. *Arizona v. Evans*, 514 U.S. 1, 9 (1995). Prompt resolution of the issue presented by this case is necessary to provide guidance to lower courts currently grappling with the interplay of the Fifth Amendment and the right of the government to search digital devices for incriminating evidence.[1] Absent a decision by this Court, lower

[1] Cases where courts have struggled with deciding whether compelling production of passcodes or fingerprints violates the Fifth Amendment include: *United States v. Apple MacPro Computer*, 851 F.3d 238 (3d Cir. 2017), *petition for cert. filed sub nom. Doe v. United States* (Nov. 27, 2017) (No. 17-7387) (passcode); *Commonwealth v. Jones*,

courts will likely look to the Minnesota Supreme Court's decision in this case for guidance. The reasoning underlying that decision, however, is seriously flawed.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V; *see also Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (holding Fifth Amendment is applicable to states under Fourteenth Amendment). This Court has held that "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber v. California*, 384 U.S. 757, 761 (1966).

A testimonial communication is, the Court has explained, "a communication—written, oral or otherwise—* * * involving [the accused's] consciousness of the facts and the operations of his mind in expressing it[.]" *Doe v. United States*, 487 U.S. 201, 211 (1988) (quotation omitted). A nonverbal act implicates the Fifth Amendment, then, if it relates a factual assertion or discloses information that incriminates the actor. *Id.* at 210. Whether a compelled act constitutes a testimonial communication often is a "difficult

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2017CR49, 2017 WL 3340408 (Mass. Super. July 26, 2017) (passcode); *Matter of Search Warrant Application*, 279 F. Supp. 3d 800 (N.D. Ill. 2017) (fingerprint); *In re Application for a Search Warrant*, 236 F. Supp. 3d 1066 (N.D. Ill. 2017) (fingerprint); *State v. Stahl*, 206 So.3d 124 (Fla. Dist. Ct. App. 2016) (passcode); *SEC v. Huang*, No. 15-269, 2015 WL 5611644 (E.D. Pa. Sept. 23, 2015) (passcode); *Commonwealth v. Gelfgatt*, 11 N.E.3d 605 (Mass. 2014) (passcode); *United States v. Fricosu*, 841 F. Supp. 2d 1232 (D. Colo. 2012) (passcode); *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335 (11th Cir. 2012) (passcode); *United States v. Kirschner*, 823 F. Supp. 2d 665 (E.D. Mich. 2010) (passcode); *United States v. Rogozin*, No. 09-CR-379(S)(M), 2010 WL 4628520 (W.D.N.Y. Nov. 16, 2010) (passcode); *Commonwealth v. Baust*, 89 Va. Cir. 267, 2014 WL 10355635 (Va. Cir. Ct. 2014) (passcode and fingerprint).

question" that "depends on the facts and circumstances of the particular case." *Id.* at 214-15.

While emphasizing the need for a case-based analysis, this Court has held that compelling a person to produce subpoenaed documents can result in a "testimonial communication" if by producing the documents "the person would admit that the papers existed, were in his possession or control, and were authentic." *United States v. Hubbell*, 530 U.S. 27, 36 (2000). This Court also has held that compelling criminal defendants to exhibit "physical characteristics" or making them "the source of real or physical evidence" usually will not result in testimonial communications because such acts do not require the defendant to "disclose any knowledge he might have" or "to speak to his guilt." *United States v. Wade*, 388 U.S. 218, 222-23 (1967).

As recognized by the Minnesota Supreme Court, compelling Diamond to identify which of his fingerprints unlocked the cellphone

> does not fit neatly into either category. Unlike the acts of standing in a lineup or providing a blood, voice, or handwriting sample, providing a fingerprint to unlock a cellphone exhibits both the body (the fingerprint) *and* produces documents (the contents of the cellphone). Providing a fingerprint gives the government *access* to the phone's content that it did not already have, and the act of unlocking the cellphone communicates some degree of possession, control, and authentication of the cellphone's contents. *See Hubbell*, 530 U.S. at 36. But producing a fingerprint to unlock a phone, unlike the act of producing documents, is a display of the physical characteristics of the *body*, not of the mind, to the police. *See Schmerber*, 384 U.S. at 763.

Diamond, 905 N.W.2d at 875 (emphasis in original). Ultimately, the state court concluded there was no Fifth Amendment violation because Diamond's act of producing

his fingerprint to unlock the cellphone was "more like exhibiting the body than producing documents." *Id.*

The Minnesota Supreme Court provided two reasons for equating Diamond's act with an exhibition of the body rather than the production of documents. The court first observed that the police only wanted Diamond's fingerprint "for the fingerprint's physical characteristics and not for any implicit testimony from the act of providing the fingerprint" and, "moreover, did not present evidence at trial that Diamond unlocked the cellphone with his fingerprint." *Id.* at 875-76. The court also concluded that "Diamond's act of providing a fingerprint was not a testimonial communication because the act did not reveal the contents of Diamond's mind." *Id.* at 876. The court's logic is flawed and its reasoning irreconcilable with this Court's case law.

That police only "wanted" Diamond's fingerprint for its physical characteristics and did not introduce evidence of Diamond's act of producing his fingerprint at trial does not mean Diamond's act was not a testimonial communication. This Court's decisions make clear that whether an act constitutes a "testimonial communication" depends on whether the act "has communicative aspects of its own." *Fisher v. United States*, 425 U.S. 391, 410 (1976). The Court has also held the Fifth Amendment protects "against the prosecutor's use of incriminating information derived directly or indirectly from the compelled testimony." *Hubbell*, 530 U.S. at 38.

Diamond's act had communicative aspects of its own because "the act of unlocking the cellphone communicates some degree of possession, control, and authentication of the cellphone's contents." *Diamond*, 905 N.W.2d at 875; *see also In re*

Application for a Search Warrant, 236 F. Supp. 3d 1066, 1073 (N.D. Ill. 2017) (explaining that "[w]ith a touch of a finger, a suspect is testifying that he or she has accessed the phone before * * * currently has some level of control over or relatively significant connection to the phone and its contents"). And that act led to the discovery of incriminating evidence on the cellphone that the state did introduce as evidence at Diamond's trial. Under *Hubbell*, this is sufficient to establish a Fifth Amendment violation. *See* 530 U.S. at 38.

The Minnesota Supreme Court's assertion that Diamond's act was not a "testimonial communication" because it "did not reveal the contents of Diamond's mind" fares no better. As to this point, the court explained:

> To the extent that providing a fingerprint to unlock a cellphone might require a mental process to unlock the phone the police did not need to rely on that mental process here. *See Hubbell*, 530 N.W.2d at 43. Diamond did not need to self-select the finger that unlocked the phone. He did not even need to be conscious. Diamond could have provided all of his fingerprints to the police by making his hand available to them, and the police could have used each finger to try to unlock the cellphone.

Diamond, 905 N.W.2d at 877 (footnote omitted). But issue is not what Diamond *could have done* to give the police what they needed or even whether the police *needed to rely* on Diamond exercising his mental processes to obtain that fingerprint. The issue is whether the *specific act compelled by the district court* required Diamond to "disclose any knowledge he might have." *Wade*, 388 U.S. at 222.

In this regard, the district court did not merely order Diamond to let police place his fingers on the cellphone, something that may or may not have implicated the Fifth Amendment. *See id. at* 223. The court's written order directed Diamond "to provide a

fingerprint or thumbprint as deemed necessary by the [police] to unlock his seized phone." (App. C4.) And when Diamond asked the police "What finger do you want?" he was told by two detectives: "The one that unlocks it." (App. D10.) To provide the fingerprint the police "deemed necessary," then, Diamond had to "use his mind" to identify *which* of his fingerprints unlocked the phone. *See Matter of Search Warrant Application*, 279 F. Supp. 3d 800, 804 (N.D. Ill. 2017) (recognizing that compelling a person to select which finger to put on sensor, unlike letting police choose the finger, would require person to use their mind).

The specific act Diamond was compelled to perform seems to exhibit all the hallmarks of a "testimonial communication." The act required Diamond to "use his mind" to identify which of his fingerprints opened the cellphone. And by performing this act Diamond conveyed information to the police, specifically, that he had the capability of unlocking and using a cellphone containing incriminating evidence that police could place near the scene of a crime. And contrary to the Minnesota Supreme Court's decision, the nature of the act does not change merely because police could have obtained the evidence some other way or because the state did not present evidence of the compelled act itself at Diamond's trial.

The reasoning of the Minnesota Supreme Court also would mean, as other courts have concluded, that compelling a defendant to produce a passcode would violate the Fifth Amendment whereas compelling a defendant to produce a fingerprint would not. *See, e.g., Commonwealth v. Baust*, 89 Va. Cir. 267, 2014 WL 10355635, at *4 (Va. Cir. Ct. 2014) (concluding a "[d]efendant cannot be compelled to produce his passcode to

access his smartphone but he can be compelled to produce his fingerprint to do the same"). This makes no sense because in each instance the actor is being compelled to produce incriminating evidence for the police and both acts demonstrate the same connection to and control over the device containing the incriminating evidence.

The applicability of the Fifth Amendment, moreover, should not turn on what type of technology a smartphone owner uses to safeguard the contents of their phone. If it does, smartphone owners desiring to keep the contents of their phones from police will simply secure the phone with a passcode in combination with or in lieu of a fingerprint. *See* Jacobsen, 85 Geo. Wash. L. Rev. at 582-833 (explaining that requiring production of fingerprints but not passcodes is not a viable solution to problem confronting law enforcement because not all smartphones have fingerprint authentication technology and a user can always choose to use a numerical or alphanumerical passcode).

Also, differentiating for Fifth Amendment purposes the act of producing a passcode from the act of producing a fingerprint courts often is based on an antiquated key-to-a-strongbox combination-to-a-safe analogy. *See, e.g., Baust*, 2014 WL 10355635, at *3 (relying on analogy to conclude production of passcodes but not fingerprints implicates Fifth Amendment). This Court invoked the analogy in *Doe* and again in *Hubble* to support its conclusions in those cases. *See Doe,* 487 U.S. at 210, n. 9 (explaining that compelling execution of consent directive is "more like be[ing] forced to surrender a key to a strongbox containing incriminating documents than it is like be[ing] compelled to reveal the combination to [petitioner's] wall safe") (internal quotations omitted); *Hubble*, 530 U.S. at 43 ("The assembly of those documents was like telling an

inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox"). But the analogy, because it has little application and can be misleading in today's world of technology, bears revisiting by this Court. *See Riley*, 134 S. Ct. at 2484-85 (concluding that the rationale for the categorical search-incident-to-arrest exception recognized in prior case law was inapplicable when searching for digital content on cellphones).

Finally, the key-to-a-strongbox combination-to-a-safe analogy itself is based on the assumption that the Fifth Amendment applies only to "testimonial communications." But this Court has not always interpreted the amendment this way, and a "substantial body of evidence suggests the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence." *Hubbell*, 530 U.S. at 49-56 (Thomas, J., joined by Scalia, J., concurring). Under this broader reading of the Fifth Amendment, the mere act of compelling a defendant to produce evidence of his guilt—whether by producing a passcode or fingerprint—would violate their right against compelled self-incrimination. *See id.* (evincing willingness "to reconsider the scope and meaning of the Self-Incrimination Clause").

As can be seen, the issue in this case presents a new twist on the "difficult question" of when an act constitutes a "testimonial communication." *Doe*, 487 U.S. at 214. It raises questions about how the Fifth Amendment applies in an era of modern technology. It possibly raises questions about the true scope of the Fifth Amendment itself. And the resolution of the issue will have wide ramifications for smartphone users and law enforcement nationwide. This Court should grant the writ in this case and settle

the issue to provide guidance to the lower courts, and so smartphone users know their rights and law enforcement agencies seeking to search smartphones and other digital devices know their options.[2]

CONCLUSION

The petition should be granted so this Court can decide the important Fifth Amendment issue presented by this case.

Respectfully submitted,

Steven P. Russett
Assistant State Public Defender

Office of the Minnesota Appellate Public Defender
540 Fairview Avenue North, Suite 300
St. Paul, MN 55104
(651) 201-6700
Steven.Russett@pubdef.state.mn.us

Counsel of Record for Petitioner

[2] A petition for a writ of certiorari has been filed in another case asking this Court to decide whether under the Fifth Amendment a person can be compelled to produce passcodes for encrypted digital devices. *See United States v. Apple MacPro Computer*, 851 F.3d 238 (3d Cir. 2017), *petition for cert. filed sub nom. Doe v. United States* (Nov. 27, 2017) (No. 17-7387). But because courts tend to distinguish passcodes from fingerprints for Fifth Amendment purposes, *see, e.g., Baust*, 89 Va. Cir. 267, 2014 WL 10355635, at *4, granting the writ in that case will not necessarily resolve whether a defendant can be compelled to produce a fingerprint.