**No. AMC3-SUP 2014-37-02**

# FOR THE APPELLATE MOOT COURT COLLEGIATE CHALLENGE

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**GEORGE JANUS,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

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**On Writ of Certiorari to**

**the Supreme Court Of The United States**

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# BRIEF FOR THE PETITIONER

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## QUESTIONS PRESENTED

I. Whether the Routine Booking Exception to *Miranda* applies when an officer reasonably should know a question will lead to an incriminating response?

II. Whether the Fifth Amendment protects an individual from a subpoena to decrypt files when doing so would be tantamount to an admission of ownership and control in regard to the files?

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SUPREME COURT OF THE UNITED STATES
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BRIEF FOR THE PETITIONER

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## JURISDICTION

The parties agree that as the final court of appeals, the Supreme Court of the United States has jurisdiction over this case. The parties further agree to not raise any jurisdictional issues in either their briefs or their oral arguments.

## STATEMENT OF THE CASE

In October 2011, George Janus ("Janus") was arrested for possession of narcotics and questioned about ownership of a cell phone. R. at 02-4. Following his arrest, search warrants were obtained for his place of business, a laptop computer, and cell phone. R. at 02-14. In November 2011, the United States District Court for the District of Franklin subpoenaed Janus to enter a password to decrypt files found on the laptop. R. at 02-19. In January 2012, Janus filed a motion requesting that the district court quash the subpoena and suppress his testimony from the booking procedure. R. at 02-20. The trial court denied his motion. R. at 02-22. Janus then entered a conditional guilty plea, reserving the right to appeal two issues. R. at 02-23. In February 2012, Janus filed his notice of appeal with the United States Court of Appeals for the Fourteenth Circuit. R. at 02-24. The court of appeals affirmed the district court decision. R at 02-24. On Octo-

ber 21, 2012, Janus filed a writ of certiorari to the United States Supreme Court. R. at 02-40. On October 31, 2012, the Supreme Court granted the writ of certiorari. R. at 02-41.

## STATEMENT OF THE FACTS

Two years prior to Janus's arrest, Officer Aronson ("Aronson") received testimony from a convicted drug distributer, Carl "Needles" Peters ("Needles"), that Janus was using a cell phone, laptop, and his place of business, Greased Monkeys Automotive Service, to smuggle drugs between Canada and the United States, which violates 18 U.S.C.S. §§ 2 and 1962. R. at 02-11. However, Needles did not describe the cell phone or the computer Janus allegedly used and never mentioned seeing Janus enter a password to access files. R. at 02-13. Two years later, Aronson and his partner, Officer Raquel ("Raquel"), pulled over Janus for violating traffic laws. R. at 02-11–02-12. When Janus stepped out of the vehicle, an individual dose of 3,4-methylenedioxy-N-methyl amphetamine ("MDMA") fell out of his pocket. *Id*. Janus was arrested. R. at 02-12. In Janus's possession, the officers found an Apple phone 4GS with a Greased Monkeys Sticker on the back, and a black bag containing a laptop computer. *Id*.

Upon arrival at the police station, Officer Chuck pulled Aronson aside and reminded him of the testimony from Needles and the allegations against Janus. *Id*. Directly following the conversation between Aronson and Chuck, Raquel began the booking procedure. *Id*. When Raquel left the room, Aronson stopped asking biographical questions and began asking Janus about the items in his possession. *Id*. Aronson asked Janus five times whether the cell phone belonged to him, twice after Janus admitted ownership. R. at 02-7. Only after questioning Janus about the phone did Aronson read Janus his *Miranda* rights. R at 02-8.

After executing search warrants, no conclusive evidence of drug trafficking was discovered. R. at 02-16. One file on the laptop, entitled "Business Materials," was encrypted. *Id*. A let-

ter from FileShield Encrypting, Inc. revealed that only the owner of the encrypted files can enter the password needed for decryption. R. at 02-2. The district court subpoenaed Janus to enter the password. R. at 02-18. Janus pled for protection against government encroachment upon his Fifth Amendment right, but relief was denied. R. at 02-23; R. at 02-39.

## SUMMARY OF THE ARGUMENT

Janus's Fifth Amendment right against self-incrimination was violated twice by the state: first, when Aronson asked questions he knew would lead to incriminating evidence, and second, when the state subpoenaed Janus to decrypt files. In order to protect an individual's right against unconstitutional intrusion, the "should have known" standard must be used to determine if questions asked under the guise of booking procedure violate the individual's Fifth Amendment right. Also, no question regarding inventory should be permitted under the booking exception to *Miranda.* Additionally, the government should not compel an individual to decrypt files when doing so would be testimonial. Furthermore, the "foregone conclusion" standard should not apply when production would express ownership.

## ARGUMENT

### I. QUESTIONS A GOVERNMENT AGENT REASONABLY ANTICIPATES TO ELICIT AN INCRIMINATING RESPONSE ARE NOT PROTECTED UNDER THE ROUTINE BOOKING EXCEPTION TO *MIRANDA*, BECAUSE QUESTIONS OF THIS NATURE VIOLATE A DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

*Miranda v. Arizona* held that the circumstances surrounding custodial interrogation are so detrimental to an individual's Fifth Amendment right against self-incrimination that an individual must be informed of his or her rights before questioning can proceed. *Miranda v. Arizona*, 384 U.S. 436, 455 (1966). This Court, however, has carved out a small exception to *Miranda* when the questions are those "normally attendant to arrest and custody." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). This is known as the routine booking exception. This Court in *Innis* also

held that, "[A] question that the police *should know is reasonably likely to evoke an incriminating response* from a suspect thus amounts to interrogation." *Innis*, 446 U.S. at 301 (emphasis added). This Court also held that when questions are intended to elicit an incriminating response, they are not shielded under the routine booking exception, and an individual's rights are violated when those questions are asked without *Miranda* warnings. *Muniz*, 496 U.S. at 590. The Maryland Court of Appeals in *Hughes v. State* ruled that any question an officer should know may "evoke an incriminating response," cannot be shielded under the booking exception to *Miranda*, no matter how "innocuous on its face." *Hughes v. State*, 695 A.2d 132, 91 (Md. 1997).[1]

A. *The "should have known" standard applies, and Janus's Fifth Amendment right was violated when seasoned officers failed to Mirandize him before asking if he owned the alleged incriminating property*.

There is a circuit split regarding whether the "should have known" standard or the "routine booking exception" would be congruent with *Innis* and *Muniz.* The Ninth Circuit in *United States v. Mata-Abundiz* provided a case-by-case standard of reviewing whether a question is a violation of one's *Miranda* rights. *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983). Like the case at bar, an officer asked Mata-Abundiz a booking question he should have anticipated would be incriminating. *Id.* The Ninth Circuit held that even if the question is part of routing booking procedure, if there is reason to believe it could elicit an incriminating response, it *cannot* fall under the booking exception to *Miranda. Id.* The Fourth Circuit in *United States v. Doe* created the "should have known standard," which held that if, according to the perception of the defendant, the officer should have known a booking question might lead to incriminating testimony or evidence, the question cannot be protected under the blanket of the booking exception to *Miranda. United States v. Doe,* 878 F.2d 1546, 1552 (1st Cir. 1989).

[1] *See generally United States v. Pacheco-Lopez*, 531 F.3d 420 (6th Cir. 2008).; *United States v. Virgen-Moreno*, 265 F.3d 276 (5th Cir. 2001); *United States v. D'Anjou*, 16 F.3d 604 (4th Cir. 1994)

The Respondent argues, for an application of the routine booking exception that is blind to the circumstances of the case, claiming the "should have known" standard would be too burdensome to the judicial process. R. at 02-31. However, This Court in *Melendez-Diaz v. Massachusetts* disagreed with this argument, reasoning,

> The Confrontation clause *may make the prosecution of criminals more burdensome*, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—*like those other constitutional provisions*—is binding, and The United States Supreme Court may not disregard it at its convenience.

*Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009) (emphasis added). While *Melendez-Diaz* specifically addressed the right to confront one's accusers, its decision arose from a fundamental American principal: the protection of the accused against a powerful State. *Id.* at 325. This Court ruled the constitutional rights of the defendant outweighed the state's interest in decreasing its own workload or expediting the criminal justice process. *Id*. at 325.

Furthermore, the Respondent's reliance on *Hiibel v. Sixth Judicial District Court* to support a blanket exception to *Miranda* was misplaced. R. at 02-33. This Court in *Hiibel* permitted compulsion of identity only because "the petitioner's refusal to disclose his name was not based on any articulated fear that his name would incriminate him or that it would 'furnish a link in the chain of evidence needed to prosecute' him." *Hiibel v. Sixth Judicial Dist. Court of Nev*., 542 U.S. 177, 190 (2004) (quoting *Hoffman v. United States,* 341 U.S. 479 (1951)). As such, this Court should resolve the conflict among the circuit courts and set the precedent that if an officer should know a question may lead to an incriminating question, that question is not permitted under the booking exception to *Miranda*.

Here, Janus's admission of ownership of the phone was equivalent to testimony that he owned any incriminating evidence discovered on the phone, and Aronson should reasonably have known it to be so. Two years prior to the arrest of Janus, Aronson was present at the testi-

mony given by Needles, who alleged that Janus had been using his cell phone to conduct an illegal drug-trafficking enterprise, which violates 18 U.S.C.S. §§ 2 and 1962. R. at 02-11. Just moments prior to booking Janus, Chuck reminded him of the testimony. R. at 02-12. Furthermore, Aronson displayed an obvious interest in obtaining the answer to the question when he asked it five times, two times after receiving an answer. R. at 02-7. The evidence suggests that Aronson actually knew his question would elicit an incriminating response, which obviates the need to determine whether he "should have known" this. The nonexistence of the *Miranda* warnings, therefore, violated Janus's Fifth Amendment right.

B. *Officer Aronson erred in asking a question regarding ownership of items found in Janus's possession, because questions regarding ownership of property serve no pertinent function to the booking process*.

The Maryland Court of Appeals in *Hughes* supported a routine booking exception to *Miranda:* "In order for this exception to apply, however, the questions must be directed toward securing 'simple identification information of the most basic sort.'" *Hughes*, 695 A.2d at 94. The functionality of a question is important but should be weighed against the potential detriment a standard question could do to an individual's rights. This Court in *Muniz* held, questions covered under the booking exception to *Miranda* must not typically trigger the classic trilemma of self-accusation: self-accusation, contempt, or perjury. *Muniz*, 496 U.S. at 595 (quoting *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964)). Very often questions regarding inventory will directly relate to incriminating evidence found on the person of the accused because the items on the individual's person can be and often are used against him in court. As such, the functionality of asking an inventory question is far outweighed by the potential damage of allowing inventory questions to be asked in any and every circumstance without one's Fifth Amendment right against self-incrimination attaching.

This Court should rule that inventory-related questions are likely to elicit an incriminating response and are not protected under the exception to *Miranda* because they are equivalent to custodial interrogation. Texas Court of Appeals in *Alford v. State of Texas* held that questions of ownership were a necessary part of police procedure to avoid police theft of personal items. *Alford v. State of Texas*, 358 S.W.3d 647, 661 (Tex. 2012). However, there are ways to guard against theft which would be far less invasive on the rights of the accused. Often, individuals are arrested with evidence on their person. One can be questioned about possession without a mention of ownership. Compelling an individual to admit ownership forces him into the classic trilemma of self-accusation. *Muniz*, 496 U.S. at 595 (quoting *Murphy*, 378 U.S.). As such, questions regarding ownership of possessions should not be protected under the booking exception to *Miranda.* Because the questions asked by Aronson to Janus were questions regarding inventory and are not exempt from *Miranda*, Janus was interrogated unlawfully; his Fifth Amendment and *Miranda* rights were violated, and his admission of ownership of the phone should be suppressed.

## II. THE ACT OF ENTERING A PASSWORD TO DECRYPT FILES IS A TESTIMONIAL COMMUNICATION OF OWNERSHIP AND, IF COMPELLED, A VIOLATION OF THE FIFTH AMENDMENT.

"No person shall be . . . compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. While the government does have an interest in gathering evidence and forming its case, it cannot require an individual to "be a witness against himself." There can be no doubt that the entering of a password to decrypt files is an admission of ownership and control over the files. As such, if the act of entering the password is the direct result of state compulsion, then Janus's Fifth Amendment right has been violated.

*A. The act of entering a password to decrypt files is equivalent to testimony of ownership of the files.*

Computer files alone are not protected. *Fisher v. United States*, 425 U.S. 391, 419 (1976). However, also according to *Fisher,* individual rights must take precedent over State interest:

> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the [defendant].

*Id.* at 410. [2] This court in *Hiibel* set a three-prong test for Fifth Amendment protection: "1) compulsion, 2) testimonial communication or act, and 3) incrimination." R. at 02-28 (citing *Hiibel v. Sixth Judicial Dist. Court of Nev*., 542 U.S. 177 (2004)). The act of entering the password would "force [testimony of ownership] from the lips of the accused." *United States v. White,* 322 U.S. 694, 698 (1944). This Court in *Doe* defined testimony as "a statement, act, or written communication . . . which relate[s] a factual assertion or disclose[s] information." *Doe*, 487 U.S. at 210. Here, only the owner of the files is capable of decrypting them. R. at 02-2. Additionally, the Eleventh Circuit concluded, "[D]rawing out the key principles from the Court's two decisions [in *Fisher* and *Hubbell*], an act of production can be testimonial when the act conveys some explicit or implicit statement of fact that certain materials exist, are in the subpoenaed individual's possession or control, or are authentic." *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011,* 670 F.3d 1335, at 1345 (11th Cir. 2012) (alteration in original). Janus's entering of the password would convey a fact of existence, ownership, and authenticity of the files, because as indicated by FileShield, only the owner of the files has the power to decrypt. R. at 02-2.

Furthermore, the trilemma of self-accusation is met here. This Court in *Muniz* utilized the classic trilemma of self-accusation to determine if an act was testimonial: "by telling the truth,

[2] *See generally In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335 (11th Cir. 2012); *United States v. Ponds*, 454 F.3d 313 (D.C. Cir. 2006);*Doe v. United States*, 487 U.S. 201 (1988); *United States v. Rodriguez*, 706 F.2d 31 (2d Cir. 1983);

perjury by giving a false response, or contempt by remaining silent." *Muniz*, 496 U.S. at 496. Janus was faced with the choice of admitting ownership and the existence of the files; committing perjury by saying he could not access them, or being held in contempt by refusing to enter the password. Because the act of decryption here would relate a factual assertion of ownership and control over the files and would be tantamount to testimony, it should be protected by Janus's Fifth Amendment right against self-incrimination.

B. *The "foregone conclusion" standard does not apply to encrypted files when there is no current corroborated evidence that the encrypted section of a computer holds incriminating files.*

The foregone conclusion standard, if applied incorrectly, has the power to strip an individual of his Fifth Amendment right against self-incrimination when the government has no reasonable proof of the existence, location, and ownership of the evidence. The Court of Appeals for the Second Circuit held, "[W]hile the content of voluntarily prepared documents are not privileged, the act of producing them in response to a subpoena may require incriminating testimony . . . 'if the existence and location of the subpoenaed papers are unknown to the government.'" *In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87, 93 (2d Cir. 1993) (quoting *United States v. Fox*, 721 F.2d 32, 36 (2d. Cir. 1983)). The State must, according to *Fisher*, have knowledge of the contents and location of files for them to be legally subpoenaed under the foregone conclusion standard. *Fisher*, 425 at 407–08. For example, the District Court for the District of Colorado in *Fricosu* permitted the decryption of files because the defendant in that case confessed on tape to the existence of the files. *United States v. Fricosu*, 841 F. Supp. 2d 1232, 1237 (D. Colo. 2012).Here, Janus has not confessed ownership of the computer or files.

Furthermore, the Respondent relied solely on the interrogation of a convicted drug dealer two years prior to Janus's arrest to claim the foregone conclusion standard. R. at 02-33. The Re-

spondent's informant, Needles, never saw Janus entering a password to access the mentioned files or described the alleged computer. R. at 02-13. Furthermore, there was no reason to assume, even if Needle's testimony were accurate, that Janus would be utilizing the same laptop two years later. Additionally, no conclusive evidence of drug trafficking was found from any of the search warrants served on Janus. R. at 02-17. As such, the existence of incriminating files cannot be a foregone conclusion and their production is protected.

This Court in *United States v. Bryan* did hold that the state has a compelling interest in obtaining "every man's evidence," *United States v. Bryan*, 339 U.S. 323 at 331 (1949). However, cases such as *Marchetti* and *Miranda* have also supported the protection against unjust exploitation by a powerful state. *Marchetti v. United States*, 390 U.S. 39 (1968);*Miranda v. Arizona*, 384 U.S. 436 (1966). Without intervention from this court, the Janus's rights will be trampled upon.

## CONCLUSION

For the foregoing reasons the Petitioner respectfully requests that this Court overturn the ruling of the Fourteenth Circuit Court of Appeals and hold that Janus's Fifth Amendment rights were violated when the State failed to Mirandize him before questioning him and when the State compelled him to enter a password to decrypt files.

Respectfully submitted,

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