

Update on Fingerprints, Phones, and the Fifth Amendment

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Can a court order a suspect to use the suspect's fingerprint to unlock his or her smartphone? Or would that violate the suspect's Fifth Amendment privilege against self-incrimination? I wrote about that issue [here](#). This post updates the previous one with two new cases and some additional discussion.

Background. The Fifth Amendment provides in part that no person may be "compelled in any criminal case to be a witness against himself." This privilege against self-incrimination applies during the investigative phase of a case as well as at trial. And it applies to the disclosure of information that may lead to incriminating evidence even if the information is not itself directly indicative of guilt. However, it applies only to "testimonial" activity, not to nontestimonial actions like providing fingerprints, blood samples, or voice exemplars. The "act of producing" evidence that is not itself testimonial "may have a compelled testimonial aspect," as when the act of producing the evidence constitutes an admission that the evidence was in the suspect's possession or control. *United States v. Hubbell*, 530 U.S. 27 (2000) (ruling that tax fraud charges must be dismissed because the charges were based on documents the defendant produced in response to a grand jury subpoena; the defendant's act of producing the documents was testimonial because "the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of" any incriminating documents; "[t]he 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").

Smartphones are often secured by passcodes or fingerprint sensors. I've written about computer passwords, which present the same Fifth Amendment issues as passcodes, [here](#) and [here](#). In brief, some courts view compelling a suspect to provide a passcode as requiring a testimonial act because the passcode is contained in the suspect's mind, and because providing the passcode may constitute an admission that the phone belongs to the suspect or is under the suspect's control. That doesn't necessarily mean that a court can never order a suspect to provide a passcode. If the court concludes that it is obvious that the phone in question belongs to the suspect so that the act of providing the passcode wouldn't further incriminate the suspect, the court may rule that the suspect's knowledge of the passcode is a "foregone conclusion," rendering the Fifth Amendment inapplicable. Or the court might rule that the suspect may be required to provide the passcode if given immunity for the act of providing it. Both those possibilities involve complex legal questions that I hope to explore in a future post.

Although passcodes present thorny Fifth Amendment issues, the early authority on point regarding fingerprint sensors suggests that compelling a suspect to use his or her finger to unlock a phone is not testimonial. The suspect is required only to do a physical act -- placing his or her finger on a sensor -- and need not admit anything in his or her mind. My earlier post cited the authority available at that time, but we have some new case law now and it points in the same direction.

New cases. The most significant new case is *State v. Diamond*, ___ N.W.2d ___, 2017 WL 163710 (Minn. Ct. App. Jan. 17, 2017). The court ruled that a "court order compelling a criminal defendant to provide a fingerprint to unlock the defendant's cellphone does not violate the Fifth Amendment privilege against compelled self-incrimination."

In brief, the police arrested a burglary suspect and found that he was in possession of a cell phone. They obtained a

search warrant for the phone and a court order requiring the suspect to provide a fingerprint to unlock the phone. On appeal, the defendant argued that this violated his Fifth Amendment right to be free from self-incrimination. The reviewing court disagreed because the order did not require the defendant to do anything that was testimonial. The court observed that the order did not require him “to disclose any knowledge he might have” and reasoned that it was no different than an order to provide a voice exemplar or a blood sample.

Less important but also worth noting is *State v. Stahl*, ___ So. 3d ___, 2016 WL 7118574 (Fla. Dist. Ct. App. Dec. 6, 2016). *Stahl* is a case about a court’s authority to order a suspect to provide the passcode to a phone, not a fingerprint. But in the course of discussing the passcode issue, the court stated: “Compelling an individual to place his finger on [an] iPhone would not be a protected act; it would be an exhibition of a physical characteristic, the forced production of physical evidence, not unlike being compelled to provide a blood sample or provide a handwriting exemplar.”

Caveat. Although requiring a suspect to press the suspect’s finger to a phone may not require any testimonial activity, orders on this point must be crafted carefully to avoid infringing on a suspect’s constitutional rights. An order requiring a suspect to “unlock” a phone, or to provide officers with an impression from “the finger that unlocks” a phone, might implicate the Fifth Amendment because such an order would require the suspect to decide which finger to use and so to share the suspect’s knowledge of which finger operates the sensor. Unless the foregone conclusion doctrine applies or the Fifth Amendment issue can be removed through the provision of appropriate immunity, such an order might be improper.

Worthwhile secondary sources. I cited a couple of secondary sources in my previous post. I’d like to add to the list two blog posts by Professor Orin Kerr, a leading scholar in this area. His principal post on the topic is [here](#), and a shorter one discussing the *Diamond* case is [here](#).