"THE FEDERAL CORNER"

Fingerprints, Thumbprints and Compelled Biometric Scans
To Unlock Encrypted Devices

Buck Files

On November 22, 2019, United States Magistrate Judge Sunil R. Harjani of the Eastern Division of the United States District Court for the Northern District of Illinois entered an order holding that compelling the defendant to place his fingers and thumbs on his Iphone home button in an attempt to unlock the phone would not be testimonial and, therefore, would not violate the defendant's Fifth Amendment privilege against self-incrimination. *In the Matter of Search Warrant Application for Cellular Telephone in United States v. Anthony Barrera*, ____F.Supp.3d ___, 2019 WL 6253812 **(N.D. Ill. – Eastern Division 2019)**.

In his opinion, Magistrate Judge Harjani cites three other cases from his district and four from other districts in which district judges or magistrate judges have written on this same issue:

- *United States v. Warrant*, 2019 WL 4047615 (N.D. Cal. 2019) [Opinion by Virginia K. Demarchi, United States Magistrate Judge] The Defendant wins.
- *In the Matter of White Google Pixel 3SL Cellphone in a Black Incipio Case*, 398 F. Supp. 3d 785 (D. Idaho 2019) [Opinion by David C. Nye, Chief United States District Judge] The Government wins.
- *In the Matter of the Search of a Residence in Oakland, California*, 354 F.Supp. 1010 (N.D. Cal. 2019) [Opinion by Kandis A. Westmore, United States Magistrate Judge] The Defendant wins.
- *In the Matter of the Search of [Redacted] Washington, District of Columbia*, 317 F.Supp. 3d 523 (District of Columbia 2018) [Opinion by G. Michael Harvey, United States Magistrate Judge] The Government wins.
- *In the Matter of the Search Warrant Application for [Redacted Text]*, 279 F.Supp. 3d 800 **(N.D. Ill. – Eastern Division 2017)** [Opinion by Edmond E. Chang, United States District Judge] The Government wins.
- *In the Matter of the Search of: The Single-Family Home and Attached Garage*, 2017 WL 4563870 **(N.D. Ill. – Eastern Division 2017)** [Opinion by Sheila Finnegan, United States Magistrate Judge] The Defendant wins.
- *In Re Application of a Search Warrant* 236 F.Supp. 3d 1066 **(N.D. Ill. – Eastern Division 2017)** [Opinion by M. David Weisman, United States District Judge] The Defendant wins.

So, which judges are correct in their analysis and which are wrong? We can speculate, conjecture and guess, but, as authority, all we have are cases in which district judges and magistrate judges have come to different conclusions. It is interesting that four of these cases come out of the same division of the same judicial district and that the judges there are split 2-2 on the issue.

Magistrate Judge Harjani's opinion reads, in part, as follows:

[An Overview]

Consumers are more often than ever using their biometric information to unlock their smartphones and apps with a fingerprint or face scan. Likewise, the government is responding by seeking authority to compel a subject to use their biometrics to unlock devices found during the execution of a search warrant. Such a request triggers potential Fourth and Fifth Amendment considerations that are addressed herein. Because of the differing views about whether a fingerprint unlock warrant violates the Fifth Amendment among courts, and in particular in this district, the Court has issued this opinion to explain its reasoning in this novel area in granting the government's application for a warrant. For the reasons that follow, this Court holds that compelling an individual to scan their biometrics, and in particular their fingerprints, to unlock a smartphone device neither violates the Fourth nor Fifth Amendment. Accordingly, the Court has signed and authorized the government's warrant, including the authority to compel fingers and thumbs to be pressed on the iPhone home button in an attempt to unlock the device.

* * *

[The Background of the Case]

In the current proceeding, the government has alleged that Barrera made various online threats to this confidential informant through postings on a Snapchat account, in violation of 18 U.S.C. § 1512(b). In connection with the government's motion to revoke Barrera's bond conditions, District Judge Robert W. Gettlemen ordered that Barrera's iPhone be turned over to Pretrial Services. The government seeks to search this iPhone, with a home button, that was taken from Barrera in order to develop evidence of his alleged threats. The iPhone has a fingerprint lock function (known as Touch ID), and the government asked this Court for a warrant to compel the defendant to place his fingers and thumbs on the iPhone home button in an attempt to unlock the phone. The government alleged in the affidavit in support of its request for a search warrant that it will select the fingers and thumbs to press on to the home button, and that the iPhone fingerprint unlock function will disable after five incorrect attempts. At that time, the iPhone function will demand a passcode to unlock the phone.

[The Fourth Amendment Issue]

* * *

When the government seeks to search the digital data on a cell phone, the Fourth Amendment generally requires a search warrant. *Riley v. California*, 573 U.S. 373, 401, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

* * *

The government's warrant application seeks authorization for another search and seizure, the taking of Barrera's fingerprints and thumbprints 'for the purpose of attempting to unlock the device via Touch ID ....'

* * *

The Court's Fourth Amendment inquiry in this case is thus straightforward: does probable cause support the search of the cell phone and the use of Barrera's fingerprints to unlock the cell phone?

The government's affidavit in support of the warrant application demonstrates probable cause.

* * *

[The Fifth Amendment Issue]

More complicated is the question of whether the forced fingerprint unlock of a cell phone implicates the Fifth Amendment to the United States Constitution. Under the Fifth Amendment, the government shall not compel an individual in any criminal case to be a *witness* against him or herself. U.S. Const. amend. V.

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[Determining Whether Communication Are Testimonial]

The test to determine whether communications or communicative acts are privileged under the Fifth Amendment is whether they are 'testimonial, incriminating, and compelled.' *Ruiz-Cortez v. City of Chicago*, 931 F.3d 592, 603 (7th Cir. 2019) (quoting *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 189, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004)); *see also Fisher v. United States*, 425 U.S. 391, 408, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976) (Fifth Amendment privilege 'applies only when the accused is compelled to make a Testimonial Communication that is incriminating'). Applying those three requirements in reverse order here, a biometric scan is certainly *compelled*—the government is explicitly requesting the Court's authority to force the scan. … The act may also be *incriminating*, as unlocking the phone may lead to the discovery of a nearly unlimited amount of potential evidence including text messages, social media posts, call logs, emails, digital calendars, photographs and videos, and location data.

* * *

But if a *compelled* act is not *testimonial*, and therefore not protected by the Fifth Amendment, it cannot become protected simply because it will lead to *incriminating* evidence. *Doe*, 487 U.S. at 208 n.6, 108 S.Ct. 2341. As a result, the relevant Fifth Amendment inquiry here is whether the compelled act of scanning a subject's fingerprint to unlock a device is a *testimonial* act.

* * *

To be testimonial, a subject's communicative act 'must itself, explicitly or implicitly, relate a factual assertion or disclose information.' *Doe*, 487 U.S. at 210, 108 S.Ct. 2341. Otherwise stated, the Fifth Amendment's self-incrimination clause is implicated wherever the compelled act forces an individual to 'disclose the contents of the [subject's] own mind.' *Id.* at 211, 108 S.Ct. 2341 (citing

Curcio v. United States, 354 U.S. 118, 128, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957)).

* * *

For example, in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the Supreme Court held that the accused's 'testimonial capacities were in no way implicated' when the government's officers extracted blood from the accused's body incident to an arrest, over the accused's objection, to test for alcohol as evidence of criminal guilt. *Id.* at 765, 86 S.Ct. 1826. *Schmerber* reasoned that Supreme Court precedent provided that only compulsion of communicative facts triggered the Fifth Amendment privilege, not compulsion of 'real or physical evidence.' *Id.* at 764, 86 S.Ct. 1826. Thus, the *Schmerber* Court concluded that the incriminating blood test evidence was not testimonial because it was neither the result of the accused's communication nor evidence of some communicative act. *Id.* at 764-65, 86 S.Ct. 1826.

The Supreme Court has similarly held that requiring grand jury witnesses to produce voice and handwriting exemplars neither violates the Fourth nor Fifth Amendment, even though speaking and writing are quintessential means of communication. *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67, (1973); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). The *Dionisio* and *Gilbert* Courts reasoned that the voice/handwriting exemplars were identifying physical characteristics that did not reflect the subject's mental impressions.

* * *

In another compelled physical act case, the Supreme Court rejected an argument that the government had violated the privilege against self-incrimination by forcing a defendant to try on a blouse for identification purposes. *Holt*, 218 U.S. at 252, 31 S.Ct. 2.

* * *

One type of compelled physical act that has been considered testimonial in certain cases is the act of producing documents. Courts have found that producing documents in response to a criminal subpoena request could be a testimonial communicative act because the responding party may need to 'make extensive use of "the contents of his own mind" in identifying the hundreds of documents responsive to the requests in the subpoena.' *United States v. Hubbell*, 530 U.S. 27, 43, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000) (citing *Curcio*, 354 U.S. at 128, 77 S.Ct. 1145).

* * *

[The Key Questions]

In analyzing this issue, the key questions, in this Court's view, are threefold: (1) whether the biometric unlock is more like a key than a combination; (2) whether the biometric unlock is more like a physical act than testimony; and (3) whether the implicit inferences that arise from the biometric unlock procedure is sufficient to be of testimonial significance under the Fifth Amendment.

* * *

[Key Versus Combination]

First, the Court holds that the biometric unlock procedure is more akin to a key than a passcode combination. The Supreme Court in *Doe*, and later in *Hubbell*, has illustrated the difference between testimonial and non-testimonial physical acts via this helpful comparison, which aptly applies to an iPhone that has two different unlock features – a fingerprint and a passcode. In *Doe*, the Court noted that the Fifth Amendment permits the government to force an individual to surrender a key to a strongbox containing incriminating documents, but not to reveal the combination to a subject's wall safe. *Doe*, 487 U.S. at 210 n.9, 108 S.Ct. 2341. Thus, using the *Doe* framework, this Court examines whether a biometric scan of an individual's finger or thumb is more like a key or a combination.

* * *

[Physical Act Versus Testimony]

Second, the biometric procedure is first and foremost a physical act. It utilizes a body part on an individual to perform an act—rather than any implicit or explicit verbal statement. Put another way, the biometric feature is a body part used to essentially determine whether an item of evidence for a case (*i.e.* a cell phone) has any evidentiary value — much like a blood sample, voice exemplar, or blouse is used to determine whether it matches the blood, voice, or physical characteristics of a suspect that would provide evidentiary value in a case. As the Supreme Court appropriately stated in *Wade*, compelling an individual to exhibit his person to the government before trial does not violate the Fifth Amendment because such a forcing is 'compulsion of the accused to exhibit his physical characteristics, *not* compulsion to disclose any knowledge he might have.' *Wade*, 388 U.S. at 222, 87 S.Ct. 1926.

* * *

Furthermore, the government selects the fingers or thumbs to impress on to the phone, not the defendant. This further supports a finding that the compelled party's thoughts are not being used in the process.

* * *

[The Implicit Inference]

Third, the Court holds that the implicit inference from the biometric unlock procedure, that the individual forced to unlock had some point accessed the phone to program his or her fingerprint, is not sufficient to convert the act to testimonial.

* * *

[Conclusion]

For the reasons discussed above, the Court finds that the government's application for the biometric unlock procedure does not violate the Fourth or Fifth

Amendments, and as a result, the Court has signed the application and the warrant after its finding of probable cause.

My Thoughts

- At this time, there are no cases from any of the United States Courts of Appeal on this issue.
- Surely, the Supreme Court will write on this issue. The problem is that it will probably be in the 2022 or 2023 term before they will have the opportunity to do so.
- Until then, we can only give an educated guess as to what the nine justices will decide.

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In evaluating the novel question of whether compelled biometric scans to unlock encrypted devices is permissible under the Fifth Amendment, federal district courts and state courts have reached different results. *See, e.g.*, *In the Matter of Search Warrant Application for [redacted text]*, 279 F.Supp.3d 800, 801 (N.D. Ill. 2017) (Chang, J.) ('[T]he Court holds that requiring the application of the fingerprints to the sensor does not run afoul of the self-incrimination privilege because that act does not qualify as a testimonial communication.'); *In re Application for a Search Warrant*, 236 F.Supp.3d 1066 (N.D. Ill. Feb. 16, 2017) (Weisman, J.) (holding that compelling a thumb print to unlock an encrypted device violated the Fifth Amendment because the act constituted testimonial act of production); *Matter of single-family home & attached garage*, No. 17 M 85, 2017 WL 4563870, at (N.D. Ill. Feb. 21, 2017) (Finnegan, J.), *rev'd by* 279 F.Supp.3d 800 (N.D. Ill. 2017) (denying warrant application to compel four individuals to unlock unspecified Apple devices during the search of subject premises because fingerprint unlock was compelled act of production); *Matter of White Google Pixel 3 XL Cellphone in a Black Incipio Case*, 398 F.Supp.3d 785 (D. Idaho 2019) (holding search warrant authorizing law enforcement to place suspect's finger on cell phone to unlock phone did not require suspect to provide any testimonial evidence and therefore did not violate suspect's Fifth Amendment rights); *Matter of Residence in Oakland, California*, 354 F.Supp.3d 1010 (N.D. Cal. Jan. 10, 2019) (denying warrant application because biometric features used to potentially unlock electronic device are testimonial under Fifth Amendment); *Matter of Search of [Redacted] Washington, D.C.*, 317 F.Supp.3d 523 (D.D.C. 2018) (granting warrant application because compelled use of subject's biometric features was non-testimonial under the Fifth Amendment); *Minnesota v. Diamond*, 905 N.W.2d 870, 878 (Minn. 2018), *cert. denied*, —— U.S. ——, 138 S. Ct. 2003, 201 L. Ed. 2d 261 (2018) ('Because the compelled act merely demonstrated Diamond's physical characteristics and did not communicate assertions of fact from Diamond's mind, we hold that Diamond's act of providing a fingerprint to the police to unlock a cellphone was not a testimonial communication protected by the Fifth Amendment.'); *Commonwealth v. Baust*, 89 Va. Cir. 267, 2014 WL 10355635, at 1 (Va. Cir. Ct. 2014) (granting warrant application to compel fingerprint and denying motion to compel cell phone passcode because passcode was testimonial whereas fingerprint was a non-testimonial physical characteristic that did not require Defendant to 'communicate any knowledge at all') (internal quotation marks and citation omitted). To date, neither the Supreme Court, the Seventh Circuit, nor any other court of appeals has weighed in.