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BLOG POST

Law Enforcement Likes Fingerprints for New and Improved Reasons

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Manufacturers of the latest generation of smartphones have touted fingerprint technology as the latest, greatest, and *safest* way to secure the contents of your phone. But while fingerprint technology may block hackers or thieves from viewing the contents of your phone, the same technology may surprisingly make it easier for government investigators to access your phone.

That was the ruling last week by a state trial judge in Virginia when confronted with the case of David Baust. *Virginia v. Baust*, No. CR14-1439 (Va. Cir. Ct. Oct. 28, 2014). Baust was charged with strangling his girlfriend in his house and, as it turns out, Baust kept a recording device in the room where the alleged assault occurred that may have transmitted a video of the incident to his Apple iPhone 5S. Police confiscated the phone and sought a court order compelling Baust to either provide his fingerprint or his smartphone passcode, either of which could unlock the smartphone. Judge Steven C. Frucci framed the issue before him as "whether the production of one's passcode or fingerprint is testimonial communication and therefore subject to the defendant's Fifth Amendment privilege against self-incrimination." *Id.*

Judge Frucci ruled that Baust could be compelled to provide his fingerprint but not his passcode. The court relied on the fine distinction between testimonial and non-testimonial evidence, a distinction that resides at the heart of Fifth Amendment jurisprudence. Testimonial evidence – that which requires a defendant to "reveal his knowledge of facts relating him to the offense" or "share his thoughts and beliefs with the government" – is protected by the Fifth Amendment's bar on self-incriminating testimony where the evidence or statements are also incriminating against the defendant. *Id.* (quoting *United States v. Kirschner*, 823 F. Supp. 2d 665, 668 (E.D. Mich. 2010)). Non-testimonial evidence includes a wide range of routine identification tactics such as photography, fingerprints, measurements, providing writing exemplars, and even blood samples. Courts can compel a defendant to furnish this evidence even if it would be incriminating because, as most courts have interpreted the Fifth Amendment, the prohibition on self-incrimination does not govern this kind of non-testimonial evidence.

The Supreme Court demonstrated the odd impact of this distinction in a hypothetical laid out in *United States v. Hubbell*, 530 U.S. 27 (2000). The *Hubbell* court noted that the government could not compel a defendant to reveal the combination to a wall safe because it would require the defendant to reveal the "contents of his own mind," but the same defendant could be compelled to "surrender the key to a strongbox" because it required no such knowledge. *Id.* at 43. The Supreme Court's hypothetical is certainly an interesting one and it provokes a strong reaction from many young lawyers. The idea that two seemingly similar security devices would receive different treatment by the Fifth Amendment's self-incrimination clause can be startling. However, as courts have interpreted the Supreme Court's hypothetical, revealing the

combination to a wall safe is incriminating in the same was as providing the key to a strongbox, but only the former involves a *testimonial* act, triggering the Fifth Amendment.

Following this distinction, Judge Frucci held that Baust could be compelled to provide his fingerprint (non-testimonial evidence) but he could not be compelled to provide his passcode (testimonial evidence). Compelling the defendant to produce his fingerprint was a fairly straightforward application of case law and the ruling on the defendant's passcode is also consistent with other recent case law. *E.g.*, *Kirschner*, 823 F. Supp. 2d 665.

Judge Frucci also rejected the government's request to apply the "foregone conclusion" doctrine, which holds that if the existence of evidence is a foregone conclusion to law enforcement, it should not be protected by the Fifth Amendment. The court held that "if the password was a foregone conclusion, the Commonwealth would not need to compel Defendant to produce it . . . ." *Baust*, No. CR14-1439. In dicta, the court added that Baust could not be compelled to provide the unencrypted video because that would be testimonial and incriminating: "production of the unencrypted recording would be testimonial because Defendant would be admitted the recording exists, it was in his possession and control, and that the recording is authentic." *Id.*

Overall, the case demonstrates the odd results that can appear when courts transfer age-old legal distinctions into the digital age. But Judge Frucci's decision is a straightforward reading of the Fifth Amendment's self-incrimination clause and at least one commentator ***predicted*** a similar outcome last year soon after Apple's fingerprint technology was first announced. Defense lawyers and law enforcement officers will monitor whether courts follow the precedent set by this decision or whether they will take a different approach. ***Another commentator*** argues thatlaw enforcement officers may be able to circumvent Judge Frucci's passcode ruling altogether by asking courts to compel a defendant to *enter* his passcode into his phone rather than requesting the passcode altogether – and while this approach may obviate some Fifth Amendment concerns, courts may find it problematic because it still requires a defendant to admit to ownership of the phone and to reveal the "contents of his own mind."

Although this case rules on topics at the bleeding edge of technology, major and minor innovations already threaten to make the ruling obsolete or at least inconclusive. On current generation Apple iPhones, for example, fingerprint technology cannot be used to unlock a phone after forty-eight hours of disuse and it cannot be used to unlock a phone that has just been turned on. Courts may soon be confronted with the minutiae of fingerprint technology as they field requests from law enforcement similar to what Judge Frucci saw in *Baust*.