



Fighting Compelled Decryption



A Guide for Criminal Defense Attorneys

1. Alphanumeric v. Biometric PWs
 - a. *VA v. David Baust*, 89 VA. Cir. 267, 2014 WL 10355635 (Cir Ct of VA Oct. 2014): Defendant can't be compelled to produce passcode or decrypt device with PW, but can be compelled to produce fingerprint
 - b. *US v. Paytsar Bkhchadzhyan* (C.D. CA 2016): FP can be compelled
2. PWs/Decryption NOT protected by 5th Amend:
 - a. *Fisher v. US*, 425 U.S. 391 (1976): can compel taxpayers to produce tax docs
 - b. *Doe v. United States*, 487 U.S. 201 (1988): can compel suspect to authorize foreign banks to disclose bank records
 - c. *US v. Fricosu*, 841 F.Supp.2d 1232 (D. CO 2012): can compel PW w/ SW
 - d. *FL State v. Stahl*, 206 So.3d 124 (FL Ct App., 2nd Dist. Dec 7, 2016) – can compel PW b/c no distinction b/t fingerprint & PW
 - e. Miami-Dade Cir: Hencha Voigt & Wesley Victor (May 2017): Judge Johnson can compel PWs: “For me, this is like turning over a key to a safe-deposit box”
3. PWs/Decryption IS protected by 5th Amend:
 - a. *US v. Doe*, 465 U.S. 605 (1984): act of producing business records was privileged and could not be compelled without a statutory grant of use immunity
 - b. *Hoffman v. US*, 341 US 479, 486 (1951): 5th Am embraces evid which would furnish a link in the chain of evidence needed to prosecute the accused
 - c. *U.S. v. Djibo*, 151 F.Supp.3d 297 (E.D. N.Y. 2015): Defendant in secondary screening “in custody” so passcode = “statement” b4 *Miranda* suppressed
 - d. *SEC v. Bonan Huang, et al.*, 2015 WL 5611644 (E.D.PA 2015): 5th Am protects PW even to employer's phone b/c producing PW is testimonial

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- e. *US v. Mitchell*, No. 17-0153 (CAAF Aug 2017): asking for PW after client invokes is custodial interrogation & violates 5th & 6th Am rights to counsel
 - i. “badgering an unrepresented suspect into granting access to incriminating information threatens the core Fifth Amendment privilege, even if the government already knows that the suspect knows his own password.” P. 9
 - ii. EFF amicus: <http://www.eff.org/Mitchell> - Passcode based decryption is inherently testimonial - not a mere physical act - and protected by 5th Amend
 - f. *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335 (11th Cir. 2012): decryption and production of device content is testimonial and protected by 5th Am
 1. govt must show w/ reasonable particularity that it seeks “a certain file and is aware, based on other information, that . . . the file exists in some specified location”
 - g. *VA v. David Baust*, 89 VA. Cir. 267, 2014 WL 10355635 (Circuit Ct of VA Oct. 28, 2014): cannot compel Defendant to produce PW or decrypt recording b/c he would be admitting recording exists, was in his possession and control, and that the recording is authentic
4. Beware foregone conclusion:
 - a. *US v. Gavegnano*, 305 F.Appx 954, 956 (4th Cir. 2009): Post-invocation PW requests don't violate 5th Amend. b/c any self-incriminating testimony is a “foregone conclusion” where the govt can independently prove suspect was the sole user and possessor of the device
 5. Beware PW as “non-testimonial” consent
 - a. *US v. Patane*, 542 U.S. 630 (2004): PW is non-testimonial when result of voluntary consent to search
 - b. *US v. Venegas*, 594 F.Appx 822, 827 (5th Cir 2014)(per curiam): “statement granting consent to a search...is neither testimonial nor communicative in the Fifth Amendment sense”
 - c. *US v. Hank Robinson*, 76 M.J. 663 (AFCCA May 2017): Investigator's request for PW after defendant invoked right to counsel was not an interrogation
 - d. *US v. Chad Blatney*, 2017 WL 2422807 (May 2017)
 6. Counter-arg – PW is testimonial: *US v. Kirschner*, 823 F.Supp.2d 665, 669 (E.D. Mich. 2010): PW emanates from “mental processes” & thus testimonial
 7. Immunity for disclosure:
 - a. *US v. Hubbell*, 530 U.S. 27 (2000): 5th Am. covers compelled statements that lead to discovery of incriminating evid. such that derivative use immunity must be granted
 8. Contempt for failure to disclose:
 - a. *US v. Bright*, 596 F.3d 683 (9th Cir. 2010)
 - b. *Apple v. John Doe*, 851 F.3d 238 (3rd Cir. Mar 2017)
 - c. Miami-Dade Cir: Hencia Voigt & Wesley Victor (May 2017) - forget ≠ contempt
 - d. FL Broward Circuit: Christopher Wheeler (May 30, 2017) – forget = contempt

Stephanie Lacambra, Criminal Defense Staff Attorney
415-436-9333 x130, stephanie@eff.org

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