Compelling Passwords

in digital evidence cases

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elements of 5th privilege

1. **"no person"**
2. **shall be "compelled"** – subpoena, otherwise force
3. **"in any criminal case"**
4. **"to be a witness against himself"**

Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself . . .

"in any criminal case"

- **only applies to criminal charges not other embarrassments or civil charges**
- **can be raised in any proceeding where answers may incriminate in future Crim proceeding**
  - grand jury
  - civil trials
  - legislative hearings
  - police stations

Exclusionary Remedy for violation of self – incrimination right

- **basis: core right itself**
- **exclusion of statement required for all purposes at trial**
  - **cannot be used to impeach**

"to be a witness against himself"

two elements

1. **Testimonial**
2. **Incriminating**

testimonial = COMMUNICATIVE

- **trial testimony**
- **police confessions**
- **act of production of private documents** (some limits)
- **demonstrative acts**

testimonial:

compelled to share his thoughts or beliefs with gov't or relate to factual assertion

Pa v. Muniz, 496 U.S. 582 (1990)

documents

creating documents -- key: why created

- **if creation not compelled, no privilege**
- ***Fisher v. U.S.,* 425 U.S. 391 (1976)**
  - **production of fraudulent tax records not protected because voluntarily prepared and thus NOT "compelled" testimonial evidence**

- **non-testimonial = source of real or physical evidence**
  - **blood test**
  - **fingerprints – handwriting samples**
  - **voice – other physical characteristics**
  - **put on clothing**
  - **lineup**

why: not forced to communicate ideas

documents

Producing documents

privilege applies if act of production demonstrates:

- **existence *or***
- **her possession *or***
- **authentication of documents**

"Incriminating"

- **persons who have "reasonable cause to apprehend danger from a direct answer"**
- **truthful response of innocent witness may provide gov't w/ incriminating evidence from speaker's mouth**

Ohio v. Reiner, 532 U.S. 17 (2001)

Forgone conclusion doctrine

privilege does NOT apply to act of production *If* information conveyed by act of production is foregone conclusion

Fisher

- **knew taxpayer possessed documents**
- **could show authenticity by other means**

therefore no Fifth Amendment privilege

Forgone conclusion doctrine

U.S. v. Hubbell, 530 U.S. 27 (2000)

- **subpoena for 11 broadly worded categories of documents to support tax / fraud charges**
- **no independent evidence of govt knowledge of docs**

Privilege applied:

- **extensive use of H's mind to assemble docs**
- **like telling combination to wall safe and not like surrendering key to strongbox**

(using mind vs. physical act)

encryption

process of encoding messages (or information) in such a way that only authorized parties can read it

Wikipedia

- **lots of free programs -- Pretty Good Privacy**

summary

two ways act of production *not testimonial*

1. **merely compels some physical act -- key to lock**
2. **foregone conclusion doctrine -- if Gov't can show with "reasonable particularity" that gov't already knew of materials**

***In re: Grand Jury Subpoena to Sebastien Boucher*, 2009 WL 424718 (D. Vt. Feb. 19, 2009)**

FACTS

- **Boucher arrested at Canadian border after ICE agent found child pornography on laptop in Z drive**
- **gov't seized laptop, shut it down, obtained warrant to search**
- **Z drive files encrypted, password-protected, and inaccessible**
- **Grand jury subpoena ordered Boucher to provide unencrypted version of Z drive**
- **Boucher moved to quash, claiming 5th privilege against self-incrimination**

Compelling Passwords

vs.

May individual invoke Fifth Amendment and refuse to comply with grand jury subpoena to provide encryption key to access files on his computer?

District Court ruling:

act of production is incriminating if

1. **existence and location of evidence unknown**
   - **not important that Gov't know contents of files – merely have reasonable certainty of existence, location of documents**

OR

2. **production would "implicitly authenticate" documents**

District Court ruling:

Ordered to provide unencrypted version:

1. **gov't knows of location of files and observed some**

   providing access "adds little or nothing to sum total of Gov't information" and existence, location of files

2. **Gov't may NOT use his production of unencrypted version as evidence of authentication**

Cf. (John Doe)

In re Subpoena dated March 25, 2011, 670 F.3d 1335 (11th Cir. 2012)

- **suspected of downloading CP while staying at 3 hotels**
- **seized computer while at another hotel**
- **computer encrypted**

scope of ruling in Boucher?

all files vs. some files?

- **Magistrate Judge determined that foregone conclusion rationale did not apply because gov't has not viewed most of files on Z drive**
- **D CT -- govt need not be aware of incriminatory contents of files -- but only demonstrate "with reasonable particularity that it knows of the existence and location of subpoenaed documents."**

John Doe facts

- **suspected You.Tube account of sharing CP**
- **3 times acct accessed from hotel rooms**
- **Doe only common guest**
- **Doe tracked to another hotel room; got warrant (no evidence of downloading in room)**
- **seizure – whole lot of digital devices / storage**
- **all encrypted**

what was in the files?

Thus:

- **Because ICE agent viewed contents of some of Z drive's files and ascertained that they may be CP, gov't existence / location of Z drive and its files**
- **Providing access to unencrypted Z drive "adds little or nothing to the sum total of the Government's information" about existence / location of files that may contain incriminating information**

forensic analysis in John Doe

- **govt exhibit -- nonsensical characters and numbers**
- **testimony of examiner**
  - **possible hard drives contain nothing**
  - **"random data is just random data"**
  - **"anything is possible"**

John Doe ruling

privilege applies

1. compelling Doe to use his mind -- ie – "testimony"
   (like giving combination to safe)

2. do not know files exist -- therefore foregone conclusion doctrine inapplicable

- role of encryption –

"Just as a vault is capable of storing mountains of incriminating documents, that alone does not mean that it contains incriminating documents, or anything at all"

FN. 28

To be clear, …

- Govt does not have to show specific file name
- file name would be easy way to show that existence of files is "foregone conclusion"
- if unaware of file name, must show w/ "some reasonable particularity" that it seeks certain file and is aware
  - (1) file exists in some specified location
  - (2) file possessed by target of subpoena
  - (3) file is authentic

John Doe: distinguishes *Boucher*

- did not have to know in B what was contained in "2YO getting raped during diaper change"
  - only had to know there existed file under that name
- Must know files exist ⇨

what could govt have done in John Doe to meet this std?

- evidence of downloading at hotel?
- names of files downloaded at hotel ?
- Known CP files downloaded ?
- CP activity on YouTube account when registered at hotel?

Boucher distinguished:

- *Boucher* did not turn on fact that Gov't knew contents of file sought
- But Gov't must show files exist
- in *Boucher*, irrelevant that Gov't knew what was in file "2yo getting raped during diaper change," but it was crucial that Gov't knew that there existed a file under such a name. That is simply not case here.
- Gov't need not show specific file names -- only that a file exists

Cf.

password for facebook

United States v. Smalcer,
2012 WL 695456 (6th Cir. 2012) (unreported)

- DEF on probation has no Fifth Amendment privilege in probation revocation proceeding
- can be ordered to disclose facebook password

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