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US v. Brown: District of Columbia Circuit Rules on Compelled Biometric Unlocking of Cellphones

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On January 17, the District of Columbia Circuit issued a pivotal opinion regarding the Fifth Amendment rights of a defendant-appellant compelled by the FBI to unlock his cellphone using his thumbprint. The D.C. Circuit's decision in *United States v. Brown* has significant implications for law enforcement practices and the protection of constitutional rights in the digital age.

The appellants in *Brown* were arrested in connection with the events on the U.S. Capitol grounds on January 6, 2021. On February 4, 2021, an FBI Agent participated in executing a search warrant at one of the appellant's residences. The appellant was already in custody when the agent discovered a black cellphone in his apartment. The agent attempted to unlock the phone using passwords provided by the appellant, but none were successful. Subsequently, the agent used the appellant's thumbprint to unlock the phone, although the agent could not recall the specifics of how this was done or his conversation with the appellant. Importantly, the government could not recall whether the request for the thumbprint occurred before or after the appellant had asked for an attorney. The district court found that the appellant was compelled to put his thumb on the phone in response to the agent's request, thereby unlocking it.

The unlocked phone revealed incriminating text messages, which were photographed by another FBI agent. Seven months later, the FBI obtained a second warrant for a forensic search of the phone, relying on the initial evidence obtained through the compelled thumbprint.

The appellant moved to suppress the evidence obtained from his cellphone, arguing that the compelled use of his thumbprint violated his Fifth Amendment rights. The Fifth Amendment protects persons from being compelled to be a witness against themselves in a criminal case; but for that protection to apply, the communication must be testimonial, incriminating, and compelled. See U.S. Const. Amend. V; *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt County*, 542 U.S. 177, 189 (2004). The district court denied the motion, concluding that no constitutional violation occurred because the act of using a thumbprint, even if compelled, was not testimonial and thus not protected by the Fifth Amendment.

On appeal, the D.C. Circuit considered whether the compelled act of using the thumb to unlock the phone was "testimonial," as required to fall within the Fifth Amendment's protection. The court's analysis focused on two key points:

- 1. Physical manifestation of testimonial thoughts:** The D.C. Circuit concluded that the physical act of unlocking a cellphone was a "manifestation[] of testimonial thoughts." The court distinguished this from furnishing a blood

sample, providing a handwriting or voice exemplar, standing in a police lineup, or donning particular clothing, which courts generally do not consider to be testimonial. In contrast, the court held this was more akin to responding to a lie detector test, where the physical action requires no additional information to communicate an incriminatory message. Unlocking the cellphone represented the appellant's thoughts of "I know how to open the phone," "I have control over access to this phone," and "the print of this specific finger is the password to this phone."

2. Act of production: The court noted that compelling the appellant to open the phone communicated to the government the appellant's knowledge of how the phone could be opened, his ownership or control over the phone, and the existence, authenticity, and ownership of documents within it.

Given the testimonial nature of the compelled act, the court ruled that both the direct evidence obtained from the phone and any derivative evidence must be suppressed. The court rejected the government's arguments for inevitable discovery and good faith exceptions, noting that the government failed to prove that the evidence would have been discovered independently of the Fifth Amendment violation and failed to provide support for extending the Fourth Amendment's good faith exception to the Fifth Amendment.

While the D.C. Circuit disagrees, the decision seems to be at odds with a recent decision from the Ninth Circuit in *United States v. Payne*, 99 F. 4th 495 (9th Cir. 2024). In *Payne*, the Ninth Circuit found that "the compelled use of a biometric to unlock an electronic device was not testimonial because it required no cognitive exertion." The D.C. Circuit distinguished *Payne* from the case at hand by noting that in *Payne* the police "forcibly grabbed Payne's thumb and used it to unlock the phone."

Implications for Law Enforcement and Legal Practice

By affirming that compelled biometric unlocking of cellphones is testimonial and protected by the Fifth Amendment, the court has reinforced the importance of safeguarding individual rights in the digital era. It also highlights the inherent tension in balancing investigative needs with constitutional protections.

While the court in *Brown* distinguished the case from *Payne*, reconciling both decisions leaves ambiguities as to when Fifth Amendment protections are triggered in the compelled use of a biometric to unlock an electronic device. Therefore, law enforcement agencies must be cautious when compelling individuals to unlock their devices, and attorneys should be vigilant in challenging evidence obtained through potentially unconstitutional means.

For further information or specific legal advice regarding this ruling and its implications, please contact our office.

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