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Fifth Amendment: Requiring Suspect to Disclose Memorized Password Constitutes Self-Incrimination

Commonwealth of Pennsylvania v. Davis, No. 56 MAP 2018 (Pa. 2019)

Reversing two lower courts, the Pennsylvania Supreme Court holds that compelling a suspected child pornographer to disclose his memorized computer password constitutes self-incrimination, violating the Fifth Amendment.

During the course of the Office of Attorney General's (OAG) investigation into child pornography, they discovered a computer at an identified IP address repeatedly used a peer-to-peer file sharing network to share child pornography. OAG agents discovered the contents of the file sharing because of software that allowed the OAG computer to make a one-to-one connection with the offending computer to download the file. Based on this, OAG obtained a court order to compel against the internet service provider, who then provided the name, address, and contact information for the customer (Joseph Davis).

In October 2015, OAG executed a search warrant for Davis' apartment based and seized a single computer. After Davis was Mirandized, he informed the agents that he lived alone, that he was the sole user of the computer that he used a hardwired password protected Internet connection, that only he knew the password to his computer, that he watched what he believed to be legal pornography on the seized computer, and that he had previously been arrested on child pornography charges. Agents arrested Davis and seized the computer. On numerous occasions OAG agents asked Davis for his password, but Davis refused to utter or write down his memorized password.

Davis was charged on two counts of violating laws criminalizing the dissemination and possession of child pornography. At a pre-trial hearing, the Commonwealth filed a motion to compel. The trial court granted the motion and on interlocutory appeal the Superior Court affirmed that decision. The Pennsylvania Supreme Court granted allocator on the issue of whether a defendant may be compelled to disclose a memorized password to allow the Commonwealth to access the defendant's lawfully seized, but encrypted, computer under the Fifth Amendment of the U.S. Constitution.

The Pennsylvania Supreme Court held that compelling a suspect to disclose their memorized password is a violation of the Fifth Amendment protection against self-incrimination. The Court relied on the distinction between testimonial and physical evidence to make their determination. The Fifth Amendment protects testimonial evidence, however some physical acts may be considered testimonial in nature. The Court noted that unlike a blood draw or handwriting exemplar—which are considered physical and therefore not testimonial—the physical act of providing a memorized password is testimonial in nature because it requires the defendant to reveal the contents of their mind. Instead, providing the password to one's computer is likened to providing the password to a safe. The goal of having a password for the safe or the computer is to protect the contents those devices hold. Compelling the password or the safe combination is not an end in itself but the means to gain access to the contents of these devices, which are incriminating.

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