

One Minute Brief

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TOPIC: Search Warrants for Compelled Biometrics

ISSUE: What is required when writing a search warrant to compel a suspect to provide a biometric feature in order to unlock an encrypted device such as a cell phone?

The use of biometric identification technology, like fingerprint and facial recognition, has become standard for authentication of mobile devices, rather than passwords which can easily be guessed or stolen. Biometric features are unique, difficult to replicate or steal, and reduce the risk of identity theft.

However, the use of biometric features rather than a password creates an additional hurdle when an investigation calls for a search of a mobile device.

When writing a search warrant for a mobile device, the affiant should include a request to permit investigators to compel the owner to provide a fingerprint and/or facial view to unlock the device.

Language that investigators are permitted to compel the suspect to provide a fingerprint or facial view should be included *on the face page of the warrant*, not just in the affidavit. *People v. Ramirez* (2023) 98 Cal.App.5th 175, 194.

Generally, "the scope of the officer's authority is determined from the face of the warrant and not from the affidavit." *Thomson v. Superior Court* (1977) 70 Cal.App.3d 101, 109. It is the face of the warrant that is signed by the judge and that commands the officer where to search and what to seize.

However, "[a] deficient description of the place to be searched or items to be seized may be cured by reference to the affidavit where '(1) the affidavit accompanies the warrant at the time it is served, and (2) the warrant uses suitable words of reference which incorporate the affidavit by reference.'" *People v. Ramirez* (2023) 98 Cal.App.5th 175, 194, quoting *People v. MacAvoy* (1984) 162 Cal.App.3d 746, 755.

By referencing the affidavit of probable cause and attaching it to the warrant at the time of service of the warrant, both the searchers and the subject of the search are properly informed of the scope of the authority granted by the court.

Best practice is to always include a statement to the effect that "the facts in support of this warrant are contained in the statement of probable cause and any exhibits, which are attached hereto and are incorporated by reference." Be sure to remember to attach the referenced documents.

Below is sample language for the face page(s) of a search warrant.

Biometric Unlock Order: Based upon the facts and circumstances provided in the affiant's affidavit in support of the issuance of a search warrant, the court orders that the suspect, [FIRSTNAME LASTNAME] [further described as a male adult with a date of birth of [XX/XX/XXXX], a CII number of XXXXXXXXXXX], provide his fingerprint(s), thumbprint(s), or face for the purpose of unlocking the biometric-enabled locking mechanism for the above-described cellular phone(s) and/or digital device(s).

Furthermore, in the event that [FIRSTNAME LASTNAME] refuse(s) to comply with this order, the court authorizes the peace officers executing this warrant to use objectively reasonable force to execute the warrant, including but not limited to depressing the finger(s)/thumb(s) of [FIRSTNAME LASTNAME] to the biometric sensor on the above-described cellular phone(s) and/or digital device(s), and/or holding the face of [FIRSTNAME LASTNAME] stationary in front of the above-described cellular phone(s) and/or digital device(s).

☐ Order granted

☐ Order not granted and/or not applicable

The statement of probable cause should include a description of the device and state facts establishing probable cause for the search of the device, including the need for the use of a biometric unlock order.

BOTTOM LINE:

- A search warrant can include an order compelling a suspect to provide a biometric feature to unlock a device. The request to compel a biometric feature should always be included on the *face page(s)* of the warrant *in addition to* the affidavit.

This information was current as of publication date. It is not intended as legal advice. It is recommended that readers check for subsequent developments and consult legal advisors to ensure currency after publication. Local policies and procedures regarding application should be observed.