IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, Appellee	:	
v.	:	
	:	**No. 15-3537**
APPLE MAC PRO COMPUTER, et al.	:	
JOHN DOE, Appellant	:	

GOVERNMENT'S OPPOSITION TO APPELLANT'S MOTION FOR A STAY PENDING APPEAL

Appellant John Doe has moved, pursuant to Federal Rule of Appellate Procedure 8(a)(2), for a stay pending appeal of the judgment of civil contempt entered in the district court by the Honorable L. Felipe Restrepo on September 30, 2015, and supplemented by an order dated October 5, 2015. After finding John Doe to be in civil contempt, at the conclusion of the hearing on September 30, 2015, the district court ordered him to be taken into custody. John Doe verbally requested a stay pending appeal, which the district court denied. No appeal of the stay order was taken by John Doe until he filed the present motion to stay on April 26, 2016.

For the reasons set forth below, John Doe is not entitled to the "extraordinary remedy" of release that he now seeks, in light of his continued and willful failure to comply with a district court order. See *United States v.*

Cianfrani, 573 F.2d 835, 846 (3d Cir. 1978). The government asks this Court to affirm the district court's denial of Doe's motion to stay.

As the stay movant, John Doe has the burden of proving that he is entitled to a stay of a court order that he has continued to disobey. This Court repeatedly has described a stay pending appeal as an "extraordinary" remedy. *See, e.g.*, *Cianfrani*, 573 F.2d at 846. When deciding whether to grant such relief, a court should consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991).

This Court recently provided guidance on how to balance these four factors. *In re Revel, AC, Inc.*, 802 F.3d 558, 568-71 (3d Cir. 2015). The "most critical" factors, it explained, are the first two: whether the stay movant has demonstrated (1) a strong showing of the likelihood of success, and (2) that it will suffer irreparable harm in the absence of a stay. *Id.* at 568, citing *Nken v. Holder*, 556 U.S. 418, 434 (2009). In addition, although "both are necessary, the former is arguably the most important part of the stay analysis." *Id.* With respect to the first factor, "a sufficient degree of success for a strong showing exists if there is 'a reasonable chance, or probability, of winning.'" *Id.* (citation omitted). While it "is not enough that the chance of success on the merits be 'better than negligible,'

the likelihood of winning on appeal does not need to be 'more likely than not.'" *Id.* at 569. With regard to the second factor, the stay applicant must demonstrate that irreparable injury is likely, not merely possible, in the absence of a stay. *Id.* "Likely" in this context means "more apt to occur than not." *Id.* (citation omitted).

If an applicant can satisfy both of these factors, a court should weigh the likely harm to the movant absent a stay against the likely harm to the opponent of the stay if the stay is granted. *Id.* "This is called the balancing of harms or balancing of equities." *Id.* A court also should consider "where the public interest lies." *Id.* Notably, "if the movant does not make the requisite showing on either of [the] first two factors, the inquiry into the balance of harms and the public interest is unnecessary, and the stay should be denied without further analysis." *Id.* at 571.[1]

If the court does reach the balancing of harms step, it should apply a "sliding-scale" approach, under which the necessary level or degree of possibility of success will vary according to the court's assessment of the other stay factors. *Id.* at 569. "Stated another way, 'the more likely the [appellant] is to win, the less heavily need the balance of harms weigh in its favor; the less likely it is to win, the more need it weigh in its favor." *Id.*

[1] Appellant John Doe incorrectly suggests that this Court must analyze all four factors, even if it concludes that Doe has not met his burden on both of the first two stay factors. *See generally* Motion at 2 and 17. *Revel* counsels otherwise.

Here, the appellant does not have any likelihood of success on the merits. The government refers the Court to its merits brief, filed today. As explained there, appellant Doe asserts that the magistrate and district courts lacked subject matter jurisdiction to employ the All Writs Act to aid in enforcement of a search warrant, and that the government instead was required to proceed by grand jury subpoena to obtain his computer equipment. He further asserts (although he did not preserve the objection) that the order violates his Fifth Amendment rights. These arguments are without any merit, for the reasons set forth in the government's brief.

In short, the magistrate judge had subject matter jurisdiction to issue the All Writs Act order because it had jurisdiction to issue a search warrant for Doe's equipment pursuant to Rule 41 of the Federal Rules of Criminal Procedure, and because the All Writs Act order – directing Doe to produce equipment in a decrypted state – was issued to facilitate execution of that warrant. This Court and the Supreme Court have rejected arguments that an investigation must proceed via subpoena rather than warrant.

Further, Doe's claim of Fifth Amendment privilege, even if preserved, fails because the All Writs Act order requires no testimony from him. Instead, under the foregone conclusion doctrine, it requires only a nontestimonial act of production. Under that doctrine, an act of production does not implicate the Fifth Amendment where any potentially testimonial component of the act of production is already known to the government. Here, based on Doe's own

statements, the testimony of his sister, and forensic analysis of the hard drives seized from Doe via a search warrant, the government already knows that Doe possessed and owned the hard drives, that he can decrypt them, and that they contain child pornography. Under these circumstances, the magistrate judge did not clearly or plainly err in concluding that the foregone conclusion doctrine applies in this case, and thus that requiring Doe to assist in decrypting the drives does not violate his privilege against self-incrimination. These conclusions, explained in detail in the government's brief, make clear that Doe has no likelihood of success on the merits.

Moreover, Doe faces no irreparable harm in the absence of a stay. In arguing otherwise, what he fails to recognize is that his imprisonment is conditional – it is based entirely on Doe's continued defiance of the district court order. There can be no question that loss of liberty is a recognized harm. But Doe's incarceration is by his own hand. His release pending an appeal is entirely avoidable through obedience to the court order.

Doe could choose to obey the court's directive by unencrypting his devices, and his release would be granted. This is no way affects his appeal. He would still be able to persist in his appeal, and, if successful, the evidence the government would gain through forcing Doe to unencrypt his devices would be suppressed. The "irreparable harm" Doe complains of now is not "irreparable" in any sense, as it is entirely within Doe's control. He therefore fails to meet the standard the law requires him to demonstrate, and his motion for a stay should be denied.

Contempt of court is an offense against a court of justice, or an interference with its orderly process. The power of a federal court to punish a contempt of its authority is defined by 18 U.S.C. § 401, which authorizes the imposition of imprisonment, at the court's discretion, and permits the Court to conduct such inquiry as is necessary to determine whether the party's action is, in fact, contemptuous. 18 U.S.C. § 401(3); Fed. R. Crim. P. 42. It is fundamental that the power of a court to make an order carries with it the power to enforce the order. Indeed, without this contempt power, "what the Constitution now fittingly calls the judicial power of the United States would be a mere mockery." *Merchants' Warehouse Co. v. Reber*, 269 F. 974 (3d Cir. 1921). *See also United States v. United Mine Workers*, 330 U.S. 258, 290 n.56 (1947).

Civil contempt orders are intended to be coercive in nature. See *United States v. Harris*, 582 F.3d 512, 514-15 (3d Cir. 2009); *Shillitani v. United States*, 384 U.S. 364, 370-71 (1966) (the conditional nature of the imprisonment was found to be based entirely upon the contemnor's continued defiance of the valid court order); *International Union, UMWA v. Bagwell*, 512 U.S. 821, 827 (1994)("[C]ivil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard.").

It is long recognized that a court may order a contemnor imprisoned for an indefinite period, until such time as he complies with the court's directives.

Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania, 678 F.2d 470, 478 (3d Cir. 1982); *Northeast Women's Center v. McMonagle*, 939 F.2d 57, 70 (3d Cir. 1991) (affirming the "coercive incarceration" imposed by the district court to induce the defendant to purge his civil contempt, as well as the district court's refusal to stay the defendant's incarceration) ; *Bagwell*, 512 U.S. at 828 (no temporal limitation on the amount of time that a contemnor can be confined for civil contempt when it is undisputed that the contemnor has the ability to comply with the underlying order); *Harris*, 582 F.3d at 516-17 (defendant's request for release rejected based on his claim that his coercive contempt conviction became "punitive" in nature – and thus converted to a criminal contempt – by his continued incarceration of more than 5 years: "There is simply no better example of a situation where a contemnor 'carries the keys of his prison in his own pocket.'"); *Chadwick v. Janecka*, 312 F.3d 597, 608 (3d Cir. 2002) (more than 7-year confinement upheld for a defendant who refused to identify the location of marital assets in a divorce action: "The meaning of the statement in *Bagwell* that a contemnor may be held 'indefinitely until he complies' is perfectly clear. The phrase 'until he complies' sets the point in time when confinement must cease. The term 'indefinitely' describes the length of confinement up to that point, namely, a period 'having no exact limits,' because the end point (the time of compliance) cannot be foretold.").

In this case, the government's request to compel decryption was pending in the federal system since August 2015. Doe had many opportunities to avoid a

finding of civil contempt, simply by complying with the court's order. He chose not to do so. Full hearings on the contempt charge were held before Magistrate Judge Rueter on September 10, 2015, and again before District Judge Restrepo on September 30, 2015. Doe chose not to testify at either proceeding, despite the fact that he bore the burden of proving that he was unable to comply with the court's order.[2] At the conclusion of this last hearing on September 30, 2015, prior to being taken into custody, the district court afforded Doe yet another opportunity to confer with his counsel and reconsider his position on complying with the court's order to unencrypt his devices. Again, Doe made the conscious decision not to do so. It was his choice, made with the full knowledge of the consequences.

[2] In civil contempt proceedings the defendant bears the burden of proving that he is unable to comply with the underlying order. *United States v. Rylander*, 460 U.S. 752, 757 (1983); *In re Ramirez*, 605 F. App'x 361 (5th Cir. 2015) (unpublished). He bears this burden even if he claims that his own testimony regarding his inability to comply would incriminate him. *Rylander*, 460 U.S. at 757-58. Thus, a defendant may choose not to testify at the contempt hearing to avoid incriminating himself, but the court may then conclude that he has failed to provide any evidence whatsoever in support of his defense of impossibility to the contempt charge. *Id*. The assertion of his Fifth Amendment right is not a substitute for evidence in meeting the burden of demonstrating his inability to comply with the court's order. *Id*; *see also Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986) (citing *Rylander*, this Circuit affirmed the dismissal of a city employee after he refused to respond in termination proceeding to bribery allegations, claiming he was protected by the Fifth Amendment; in affirming his termination from employment, this Court held that defendant has a right not to incriminate himself, but that was not a substitute for evidence that he was compelled to provide in his termination proceeding). In this case, Doe chose not to testify or to offer any evidence whatsoever regarding his failure to comply with the court order, and both courts properly found he was in contempt.

Doe complains that he is being held at the Philadelphia Federal Detention Center ("FDC") under "restrictive" conditions. Motion at 13. Specifically, Doe is housed in the Special Housing Unit ("SHU") at the FDC for his own protection, based on (1) his status as a Philadelphia Police Officer, and (2) because he is in custody on a civil case. He is being kept separate and apart from the other criminal inmates to ensure his protection. He is healthy, in a position where he can confer privately with his attorneys, and protected from the other inmates.

Doe alone "carries the keys of his prison in his own pocket," and each day he makes the decision not to comply with the court's directive. *Bagwell*, 512 U.S. at 828. Indeed, he has the power to change his own circumstance, but chooses otherwise. *See e.g.*, *Harris*, 582 F.3d at 517-18 (incarceration of more than five years on civil contempt charge held to be lawful despite the fact that civil incarceration continued after disposition of the underlying criminal case, based on defendant's continued contempt of court order: "Any incidental punitive consequences arising from the contempt can be squarely laid at Harris's own feet. We will not . . . 'dissolve a lawful order . . . merely because the contemnor persists in violating it.'").

Those who defy the court must be prepared to pay the consequences, and Doe's continued insubordination should not be rewarded with his release from the confinement ordered by the district court.

While the Court need not reach the additional factors pertinent to review of a stay, they as well favor denial of the appellant's motion. The factors outlined in

Hilton v. Braunskill permit the Court to consider the possibility of harm to other persons or entities if the stay is granted and he is released. The government asks the Court to consider the seriousness of the underlying criminal activity being investigated. Doe has a long history of sexual attraction to children and involvement in child pornography. He openly admitted his problem with child pornography to his family members. He showed his child pornography collection to his sister, and he openly made sexual comments about young children to his sister a number of times. His involvement in child pornography clearly was not behavior he was ashamed of, but as a Sergeant in the Philadelphia Police Department, it certainly was activity that he knew was illegal and that he kept hidden.

Despite his efforts to hide his crimes, Doe came under investigation for sexually exploiting children through his receiving child pornography materials over Freenet, which led to the issuance of the search warrant on his home. He was so well entrenched in child pornography that when Delaware County seized his computers, iPads, external hard drives, cell phones, and every other piece of electronic equipment, that still did not stop him from trying to obtain sexual images of children. Doe immediately obtained a new cell phone, an iPhone 6 Plus, which he then used to take photographs and video of his very young nieces on multiple occasions. That these images were to be used for Doe's sexual gratification cannot be disputed: Doe surreptitiously photographed his 6-year-old niece as she sat on a top step, his cell phone camera aimed underneath her

skirt so that he captured her genital area, and the video of his 4-year-old niece again was taken surreptitiously of the child wearing only underwear in her bed, the video focused on her genital area.

Doe took these images less than two months after police had seized equipment from his home, at a time when he knew he was still under criminal investigation. More significantly, the government asks this Court to consider that his illegal behavior had escalated beyond the world of child pornography on his computer, because he reached out to victimize his young, vulnerable nieces. Simply put, if he is willing to target his own family, Doe has demonstrated that he is a danger to any child if released. The government therefore has a profound interest in the successful completion of its investigation, which is hindered by the appellant's baseless refusal to comply with the district court's order.

Lastly, this Court may consider the public interest in denying Doe's release pending his appeal. There is a great interest in ensuring that when a court – or in this case, multiple courts – issues an order, the person subject to the order complies with it. To permit Doe to disregard the court's directives, and then also have the sanction imposed by the court repealed despite the fact that there has been no compliance, would erode confidence in the justice system. The court's power to issue orders would be tainted, and it would deter others from abiding by court directives, as there would be no consequence for failure to comply. *See In re Revel, AC, Inc.*, 802 F.3d at 568.

Doe could simply abide by the court's order to unencrypt his devices and the contempt would be resolved, while at the same time he would still preserve his pending appeal. He chooses not to take that route, and instead asks this Court to impose the extraordinary remedy of repealing the sanction imposed by the district court and release Doe. The balance of factors mandates against the stay in this case, and his motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the Government's response has been served on the Filing User identified below through the Electronic Case Filing (ECF) system:

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