IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	
	:	
vs.	:	**APPEAL NO. 15-3537**
	:	
APPLE MACPRO COMPUTER, et al.	:	
	:	
	:	
JOHN DOE,	:	
Appellant.	:	

MOTION TO STAY ORDER OF CIVIL CONTEMPT PENDING APPEAL

Pursuant to Federal Rule of Appellate Procedure 8(a) and Local Appellate Rule 8.1, appellant John Doe respectfully moves this Court to stay the judgment of civil contempt entered in the district court, the Honorable L. Felipe Restrepo presiding, by order of September 30, 2015, and supplemental order of October 5, 2015. (Exs. A, B).[1]

[1] Appellant is identified by pseudonym pursuant to this Court's order (Krause, *J*.) of April 22, 2016. In support of this motion, he has signed a declaration in his own name. The declaration is submitted herewith as Exhibit K. Exhibits to this motion have been filed under seal with a motion stating reasons for sealing.

INTRODUCTION

For nearly seven months, movant-appellant John Doe has been held under restrictive conditions at Philadelphia's Federal Detention Center despite not having been charged with any crime. (Ex. K ¶¶ 2, 6-7). Instead, his confinement stems from an assertion of his Fifth Amendment privilege against self-incrimination in response to a demand that he recall and divulge passcodes to two encrypted computer hard drives. The district court overruled Mr. Doe's claim of privilege and held him in civil contempt. Counsel orally moved "to stay the execution of the contempt pending an appeal." (Ex. C). The court denied the request without stating reasons, and remanded Mr. Doe to custody.

As reviewed more fully in the brief filed in this Court on behalf of Mr. Doe on March 30, 2016, the district court lacked jurisdiction to enter the order commanding Mr. Doe to disclose passcodes for the hard drives. Even had there been jurisdiction, the order transgresses the Fifth Amendment guarantee that no person shall be compelled to be a witness against himself. The merit of these positions is patent, and Mr. Doe's confinement under restrictive conditions at the Federal Detention Center (even as charges go lacking) is inflicting irreparable injury. Continued incarceration serves neither the prosecutorial interest in this case

nor the public interest. The judgment of contempt should be stayed and Mr. Doe released from custody pending resolution of this appeal.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The government contends there is child pornography on two hard drives seized from John Doe's residence on March 30, 2015. (*See* Ex. E ¶¶ 13-31). Mr. Doe apparently became a person of interest in a local investigation in Delaware County, Pennsylvania, by using a public, online network called Freenet, over which users can communicate and share files in a secure environment. (Ex. E ¶¶ 13-15).

Several months after the seizure of the hard drives, local authorities sought by means of a state grand jury to compel Mr. Doe to disclose the drives' encryption passcodes. (Ex. D; Ex. H at 187-190).[2] Following Mr. Doe's invocation of the Fifth Amendment privilege against self-incrimination, President

[2] The government represents that the hard drives are encrypted with Apple's 'FileVault' software. (Ex. F at 3). While law enforcement agencies are commonly able to bypass a simple log-on password, encryption involves a more sophisticated process that scrambles data, rendering it unreadable, unless the passcode is entered. (Ex. J at 296-299, 314-315; *see also* Br. of Amici Curiae Electronic Frontier Foundation and American Civil Liberties Union at 5-8 (filed Apr. 6, 2016)). At earlier stages of this matter, investigators had sought to compel Mr. Doe to disclose passcodes for several devices in addition to the hard drives. The hard drives are the only devices that remain encrypted at this time.

Judge Chad F. Kenney of the Pennsylvania Court of Common Pleas, Delaware County, ruled that Mr. Doe would not be compelled to decrypt the devices or provide passcodes to the grand jury. (Ex. D).

Undeterred, investigators turned to federal court. A warrant to search the devices issued on a Homeland Security agent's affidavit recounting the investigation. (*See* District Court Docket Entry No. 1; Ex. E ¶¶ 13-31). After obtaining the warrant, the government made an application pursuant to the All Writs Act, 28 U.S.C. § 1651, for an order compelling Mr. Doe to "produce" the drives "in an unencrypted state." (Ex. F at 1). Magistrate Judge Thomas J. Rueter so ordered. (Ex. G).

Per Judge Rueter's order, Mr. Doe appeared at the local district attorney's office and entered numerous passcodes into forensic interfaces that had been set up for the hard drives. (Ex. H at 135-142, 160; Ex. J at 318-321, 324).[3] The

[3] The portions of the record reproduced in Exhibits H and J are taken from two hearings convened subsequent to Mr. Doe's appearance at the district attorney's office. Transcripts of the hearings are included in their entirety in the joint appendix submitted with Mr. Doe's opening brief on March 30, 2016. In this motion, transcript references are to the enlarged page numbers appearing in the lower right-hand corner, which were originally added for purposes of the joint appendix.

passcodes did not work. (Ex. H at 137, 141-142; Ex. J at 324).[4] Thereafter the district court ordered Mr. Doe to show cause for his failure or inability to enter the passcodes. (*See* District Court Docket Entry No. 15). After he declined to testify, the court held him in civil contempt and remanded him to the custody of the United States Marshals. (Exs. A, B, C).[5] He has now spent nearly seven months confined under restrictive conditions in the Special Housing Unit of the Federal Detention Center despite the absence of either federal or state charges. (Ex. K ¶¶ 2, 6-7).

Before this episode began, John Doe was a sergeant with the Philadelphia Police Department who had served on the force for 17 years. (Ex. K ¶ 3). He has lived his entire adult life in the Philadelphia area, and virtually all of his family

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[4] According to an investigator, Mr. Doe advised that he did not recall the passcodes. (Ex. J at 324). Given that Mr. Doe asserts his right against self-incrimination, he presently declines to testify regarding his ability, or lack of it, to identify and disclose passcodes for the drives. Were his claim of privilege to be rejected, he may wish to put on evidence concerning lack of knowledge or recollection. *See generally United States v. Harris*, 582 F.3d 512, 517 n.5 (3d Cir. 2009) ("Due process would require, of course, that the courthouse doors be open for a contemnor to challenge the underlying order on the merits and prove a factual inability to comply with the order.").

[5] When a party is held in civil contempt based on proceedings before a magistrate judge, the procedure followed is set forth at 28 U.S.C § 636(e)(6). In essence, the magistrate judge certifies findings that are tried before a district judge. *See Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888, 902-03 (3d Cir. 1992). Here, following a hearing, Judge Restrepo held Mr. Doe in civil contempt of the decryption order signed by Magistrate Judge Rueter on August 27, 2015.

lives here as well. (Ex. K ¶ 4). Not only is he presently being held without charges, but he has never in his life been charged with a crime. (Ex. K ¶ 5). Throughout every stage of these proceedings, Mr. Doe has complied with all orders to appear, both in court and at the district attorney's office where he was to enter the encryption passcodes.

ARGUMENT

Because Mr. Doe has not been charged with any crime — be it by indictment, information, or complaint — the present matter is not a criminal case, and thus not subject to Rule 9 of the Rules of Appellate Procedure. *See* Fed. R. App. P. 9 ("Release in a Criminal Case").[6] Instead, this motion to stay is made pursuant to Rule 8(a). *See* Fed. R. App. P. 8(a)(1)(A) (addressing "stay of the judgment or order of a district court pending appeal"); *United States v. Batton*, 287 F. App'x 414, 415 (5th Cir. 2008) (reviewing stay of civil contempt under Rule 8). As noted above, Mr. Doe previously moved for a stay in the district court, (Ex. C), which the district court denied without stating reasons. *See* Fed. R. App. P. 8(a)(2)(A)(ii).

[6] In criminal cases, applications for release pending appeal are also governed by Fed. R. Crim. P. 38(a)(2). *See* Fed. R. App. P. 8(c).

"In considering whether to grant a stay pending appeal, courts consider the following four factors: (1) whether the appellant has made a strong showing of the likelihood of success on the merits; (2) will the appellant suffer irreparable injury absent a stay; (3) would a stay substantially harm other parties with an interest in the litigation; and (4) whether a stay is in the public interest." *In re Revel AC, Inc*., 802 F.3d 558, 565 (3d Cir. 2015) (citing *Republic of Philippines v. Westinghouse Electric Corp*., 949 F.2d 653, 658 (3d Cir. 1991)). Each of these factors favors a stay here.

Likelihood of Success on the Merits

To satisfy the first, 'merits' factor, "a sufficient degree of success for a strong showing exists if there is 'a reasonable chance, or probability, of winning.'" *Revel AC*, 802 F.3d at 568 (quoting *Singer Management Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc)). "[W]hile it is not enough that the chance of success on the merits be 'better than negligible,' the likelihood of winning on appeal need not be 'more likely than not.'" *Revel AC*, 802 F.3d at 569. The inquiry does not involve "an exaggeratedly refined analysis of the merits," *id*. (quoting *Washington Metro Area Transit Commission v. Holiday Tours, Inc*., 559 F.2d 841, 844 (D.C. Cir. 1977)), but something more akin to a prima facie assessment.

Each of the two issues Mr. Doe raises on this appeal has patent merit, so that the first factor strongly favors a stay.

1. Mr. Doe's first claim is that the district court lacked subject matter jurisdiction. The claim stems from the government's apparently unprecedented use of an unusual procedural vehicle to attempt to compel a suspect to give evidence in advance of potential criminal charges. Specifically, the government took resort not to a grand jury, but to a magistrate judge pursuant to the All Writs Act, 28 U.S.C. § 1651. (Ex. F at 1).

It is black letter law that the All Writs Act never supplies "any federal subject-matter jurisdiction in its own right[.]" *Sygenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31 (2002) (citation omitted). It is equally well-settled that the Act has no application where other provisions of law specifically address the subject matter concerned. *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 40-42 (1985). The compelled production of evidence in advance of criminal charges is specifically addressed by Rules 6 and 17 of the Federal Rules of Criminal Procedure, which authorize the issuance and enforcement of grand jury subpoenas; and by 28 U.S.C. § 1826(a), which specifies the authorized penalties for a witness who refuses without good cause to give the evidence demanded by the grand jury.

Because federal law commits pre-indictment investigations to the grand jury, the All Writs Act did not supply the district court with jurisdiction to order Mr. Doe to divulge the passcodes to the hard drives. It is clear that Mr. Doe has a strong likelihood of success on the first issue raised.[7]

2. Mr. Doe also has a strong likelihood of success on the second issue: whether compelling the target of a criminal investigation to recall and divulge an encryption passcode transgresses the Fifth Amendment privilege against self-incrimination. Supreme Court precedent already instructs that a suspect may not be compelled to disclose the sequence of numbers that will open a combination lock — clearly auguring the same rule for any compelled disclosure of the sequence of characters constituting an encryption passcode. *See United States v. Hubbell*, 530 U.S. 27, 43 (2000); *Doe v. United States*, 487 U.S. 201, 210 n.9 (1988); *see also id*. at 219 (Stevens, J., dissenting). At least one district court has so ruled, upholding a claim of Fifth Amendment privilege in response to a demand for the defendant's encryption passcode. *United States v. Kirschner*, 823 F. Supp. 2d 665 (E. D. Mich. 2010).

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[7] Mr. Doe's jurisdictional claim is reviewed more fully in his opening brief at pages 19 to 30.

There is only one Circuit precedent, and it also favors Mr. Doe. *See In re Grand Jury Subpoena Duces Tecum Dated Mar. 25*, 670 F.3d 1335 (11th Cir. 2012). In that case, the government contended that compelled decryption should be likened to the act of producing specific paper documents whose existence, location, and authenticity is already a "foregone conclusion." *See Fisher v. United States*, 425 U.S. 391, 411 (1976). The Eleventh Circuit accepted this analogy to the so-called 'act of production' doctrine, but upheld the suspect's claim of Fifth Amendment privilege. For purposes of compelled decryption, the court held, the act-of-production doctrine requires the government to demonstrate with "reasonable particularity" the specific files whose storage on an encrypted device is putatively a foregone conclusion. *Grand Jury Subpoena Duces Tecum*, 670 F.3d at 1346. In full, the government "must show with some reasonable particularity that it seeks a certain file and is aware, based on other information, that (1) the file exists in some specified location, (2) the file is possessed by the target of the subpoena, and (3) the file is authentic." *Id*. at 1349 n.28.

The government could show none of those things here, were the act-of-production doctrine to be applied. In its failed effort to do so, it called two witnesses. The first was Mr. Doe's estranged sister. She claimed to have looked at child pornography with Mr. Doe in his home, but admitted having no idea whether

this was on the hard drives. (Ex. H at 96, 101, 109-110; Ex. J. at 240, 245, 264-265). The putative viewing was more than a year before the hard drives' seizure. There were also grounds to doubt the credibility of Mr. Doe's sister, who had come forward to police at about the time Mr. Doe stopped paying her living expenses. (Ex. H 106-107; Ex. J at 256-257, 268-271).

The government's second witness was Detective Christopher Tankelewicz, a forensic examiner with the Delaware County District Attorney's Office. He testified only that it was his "best guess" child pornography would be found on the hard drives. (Ex. J at 346). According to Tankelewicz's understanding of the Freenet online network (in which he admits having no training), there were signs on an Apple Mac Pro computer seized with the hard drives of a user accessing or trying to access message boards with names suggestive of child pornography. (Ex. J at 306, 311-312, 339-340). In rather ambiguous testimony, Tankelewicz did not appear to say this meant any image traded over these boards was on the hard drives. (*See* Ex. J at 303-317, 336-340, 345-350). Instead, he identified a single image he believed there to be a "possibility" was on the drives. (Ex. J at 308-309). As he described it, the image was of "a four or five-year-old girl with her dress lifted up, but the image itself was small so you really couldn't see what was going on with the image." (Ex. J at 308).

On the foregoing law and facts, Mr. Doe's strong likelihood of prevailing on his Fifth Amendment claim (were jurisdiction upheld) is amply apparent, such that the first stay factor weighs doubly in his favor. Setting aside the sister's and detective's testimony for a moment, the Supreme Court precedent cited above indicates that a suspect may never be compelled to divulge an encryption passcode absent a grant of immunity. *See* 3 Wayne R. LaFave et al., *Criminal Procedure* § 8.13(a) at 388-89 n.42 (4th ed. 2015) (combination lock analogy in *Hubbell* and *Doe* opinions indicates that "revealing the combination stored in one's mind is testimonial," *i.e.*, is a disclosure categorically protected by the privilege against self-incrimination). A passcode represents the "contents of [one's] own mind," and thus cannot be forced from a suspect's own lips or fingertips. *Hubbell*, 530 U.S. at 43; *see Curcio v. United States*, 354 U.S. 118 (1957).[8]

Even were Supreme Court precedent not so favorable to Mr. Doe, the decryption order here is invalid under the 'act of production' approach taken by the Eleventh Circuit. The uncertain testimony of Mr. Doe's sister and Detective Tankelewicz does not demonstrate anything to a "foregone conclusion," *Grand Jury Subpoena Duces Tecum*, 670 F.3d at 1346, much less satisfy the demanding

[8] Mr. Doe's Fifth Amendment claim is reviewed more fully in his opening brief at pages 30 to 49.

reasonable particularity standard. While the intriguing questions raised by this appeal will require closer attention, the signs are clear that the magistrate judge's decryption order may be invalid. Mr. Doe easily shows "a reasonable chance, or probability," of prevailing on his challenge to the ensuing judgment of contempt. *Revel AC*, 802 F.3d at 568. The first factor strongly favors a stay.

Irreparable Injury

The second stay factor — whether the appellant will suffer irreparable injury absent a stay — obviously also weighs with exceptional strength in Mr. Doe's favor. He is in custody under restrictive conditions of confinement solely as a function of the contempt judgment, and has been for nearly seven months. (Ex. K ¶¶ 2, 6-7). Absent a stay, each passing day compounds the irreparable loss of liberty he has already suffered. There can be no dispute that "time behind bars is not some theoretical or mathematical concept," but virtually as concrete and devastating an injury as can be imagined. *Barber v. Thomas*, 560 U.S. 464, 504 (2010) (Kennedy, J., dissenting).

Under controlling precedent, such a manifest showing of irreparable injury weighs heavily in favor of a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (irreparable injury and likelihood of success are "most critical" factors); *Revel AC*, 802 F.3d at 569-70 (reasoning that strong showing of irreparable injury relieves

applicant of obligation to make as strong a showing on merits). While Mr. Doe's showing on each of the four factors is strong enough to pay its own way, the irreparable injury caused by his continuing confinement militates with irresistible force in support of a stay.

Effect on Third Parties and Public Interest

The third and fourth factors in the inquiry — looking respectively to the effect of a stay on other interested parties and where the public interest lies — also resolve in Mr. Doe's favor. Staying the contempt judgment will neither impair the government's opportunity to prosecute Mr. Doe (should it ever determine to do so), nor endanger the public. Furthermore, the public interest favors a stay because of the vital interests served by the Fifth Amendment privilege against self-incrimination. At stake in this case is the protection of those interests in the novel context of encrypted digital devices.

Before this matter began, Mr. Doe was employed as a law enforcement officer for 17 years, rising to the rank of sergeant. (Ex. K ¶ 3). He has lived in the Philadelphia area for his entire life, as has virtually his entire family. (Ex. K ¶ 4). In this matter, he has appeared for each hearing even after being told by former counsel that he "could go to jail for life" if held in contempt. (Ex. J at 382). Mr. Doe has also remained fully available to law enforcement at all times since notice

in March 2015 that he was a target in a child pornography investigation. Finally, he appeared as ordered at the offices of the local district attorney's office where investigators had set up forensic interfaces to be used in entering the passcodes.

The government has not alleged that Mr. Doe represents a danger to the public, nor has it alleged any inappropriate physical contact between him and a child. The nearest thing to such an allegation relates to an occasion in May 2015, several months after the hard drives' seizure, when officers were summoned to a family gathering by relatives of Mr. Doe's who claimed he had used an iPhone to record images of two young nieces' clothed genital area from some distance. (*See* Ex. H at 102-104; Ex. J at 252-256). The officers who responded seized the phone and had Mr. Doe join them at the police department's Internal Affairs Division for several hours while family members were interviewed; Mr. Doe was then sent on his way. (Ex. K ¶ 5). Nothing suggests he has now come to present a threat that police previously determined not to exist.

The public interest in vindication of the Fifth Amendment privilege makes the fourth factor weigh even more heavily in favor of a stay. *See Revel AC*, 802 F.3d at 573 (public's interest in correct application of bankruptcy code favored stay where applicant had particularly strong case on merits). At the core of the Fifth Amendment privilege is protection from the cruelty of compelling a person to be a

witness against himself. *See*, *e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (privilege ensures government may not obtain its evidence by "the cruel, simple expedient of compelling it from [a suspect's] own mouth"); *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964) (privilege protects against being put to "the cruel trilemma of self-accusation, perjury or contempt"). The privilege has long been recognized as the "most important" of the exceptions to the customary duty to give evidence before the grand jury. *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

This case not only implicates the profound interests that always attach to the privilege, but demonstrates the need to safeguard those interests in the novel context of digital devices like smart phones and hard drives, where so many citizens store vast troves of personal information concerning virtually all aspects of their lives. A stay can ensure that consideration of this vital matter is in no way impaired due to the exigency created by Mr. Doe's ongoing confinement. There are no substantial countervailing considerations, as Mr. Doe has at all times complied with court orders and could promptly be returned to custody were this Court ultimately to affirm the judgment of contempt.

In sum, all four considerations factoring in the analysis weigh strongly in favor of a stay. As to the "most critical" first and second factors, the merit of Mr.

Doe's claims is patent, and irreparable injury is being visited upon him with each passing day. The order of civil contempt should be stayed pending resolution of this appeal.

WHEREFORE, for all the foregoing reasons, appellant respectfully moves this Court to stay the order of civil contempt entered in the district court on September 30 and October 5, 2015, and accordingly to order that Mr. Doe be released from custody, pending resolution of this appeal.*

Respectfully submitted,

/s/ Keith M. Donoghue
KEITH M. DONOGHUE
Assistant Federal Defender

* This Court has the authority to condition the stay on the filing of a bond in the district court. Fed. R. App. P. 8(a)(2)(E). As Mr. Doe has not been charged with any offense, it would not be proper to release him only "on conditions," as might be contemplated in a criminal case. Should this Court disagree, Mr. Doe would request that the matter be remanded for an immediate hearing in the district court as to such conditions, if any, as may be determined lawful and appropriate.

CERTIFICATE OF SERVICE

I, Keith M. Donoghue, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that I have electronically filed and served a copy of *Appellant's Motion to Stay Order of Civil Contempt Pending Appeal* upon Filing User Michelle Rotella, Assistant United States Attorney, through the Third Circuit Court of Appeals' Electronic Case Filing (CM/ECF) system.

/s/ Keith M. Donoghue
KEITH M. DONOGHUE
Assistant Federal Defender

DATE: April 26, 2016