

IN THE UNITED STATES DISTRICT COURT
THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA :
 :
 v. : Case No. 13-cr-20371
 : Judge Victoria A. Roberts
DOREEN HENDRICKSON :

**DEFENDANT DOREEN HENDRICKSON'S
MOTION FOR MODIFICATION OF RELEASE CONDITIONS**

Defendant Doreen Hendrickson, by and through her undersigned counsel, hereby moves to modify her release conditions, and in support hereof states the following:

1. On or about May 14, 2013, a grand jury sitting within this judicial district charged Doreen Hendrickson with one count of criminal contempt in violation of 18 U.S.C. § 401(3).

2. The grand jury alleged that Mrs. Hendrickson violated an Amended Order dated May 2, 2007 issued by The Honorable Nancy Edmunds as part of a ruling in a lawsuit brought against Mrs. Hendrickson by the United States. In particular, the grand jury alleged that Mrs. Hendrickson violated Judge Edmunds's Order by: i) filing a 2008 income tax return through which Mrs. Hendrickson sought a \$5 refund; and ii) by failing to file amended 2002 and 2003 tax returns containing content dictated by the government.

3. On or about July 25, 2014, a petit jury convicted Mrs. Hendrickson of the charges set forth in the Indictment.

4. On or about April 9, 2015, the Court imposed sentence. Specifically, the Court sentenced Mrs. Hendrickson to eighteen (18) months in prison and one year of supervised release.¹ Due to Mrs. Hendrickson's precarious financial predicament, the Court waived a fine.

¹ A copy of the Court's Judgment issued April 14, 2015 is attached as Exhibit "A."

Additionally, since there were no victims of Mrs. Hendrickson's conduct, restitution was not an issue in the case and, hence, the Court ordered none.

5. Mrs. Hendrickson has appealed her conviction and this Court's sentence. Mrs. Hendrickson will soon seek continued release pending appeal under 18 U.S.C. § 3143(b).

6. In sentencing Mrs. Hendrickson, the Court delayed execution of her sentence and allowed her to report to the institution designated by the Bureau of Prisons ("BOP") within sixty (60) days of the date of sentencing. The Court's decision to allow self-surrender is not surprising and represents a continued recognition that Mrs. Hendrickson is not a risk to flee or a danger to the community. Mrs. Hendrickson has been under Court supervision since June 11, 2013, when United States Magistrate Judge R. Steven Whalen entered an Order setting conditions of release, with which Mrs. Hendrickson has, without exception, complied. In fact, Pretrial Services Officer Carl W. Smith and Probation Officer William Hampstead both confirmed Mrs. Hendrickson's unqualified compliance with her conditions of release.

7. The Court, however, did qualify Mrs. Hendrickson's self-surrender. Specifically, the Court directed that Mrs. Hendrickson file amended 2002 and 2003 tax returns, ostensibly required by Judge Edmunds's May 2, 2007 Order.² Specifically, as set forth in Exhibit "A," the Court directed as follows:

² Mrs. Hendrickson will not repeat the history of her good faith efforts to comply with Judge Edmunds's Order.

Additional Requirements: Within 30 days from the entry of this judgment, Hendrickson must cooperate with the IRS and file amended tax returns for 2002 and 2003. Defendant shall not alter the jurats, add disclaimers, or otherwise make it impossible for the IRS to properly process them. The returns cannot be based on any theory contained in Cracking the Code especially the theory that only federal, state or local government workers are liable for the payment of federal income tax or subject to the withholding of federal income, Social Security and Medicare taxes under the internal revenue laws. These 2002 and 2003 amended tax returns shall include the gross income for the 2002 and 2003 taxable years, the amounts that Peter Hendrickson received from his former employer, Personnel Management Inc., during 2002 and 2003, as well as the amounts that Doreen Hendrickson received from Una Dworking during 2002 and 2003. The defendant must supply proof to the Court and Government that she filed these amended returns. If defendant does not intend to file the amended 2002 and 2003 tax returns, she must file with the Court a letter saying so, and the Marshal Service is to immediately detain her for incarceration.

Exhibit A at p. 2.

8. Coincidentally, the Court also imposed as a requirement of Supervised Release that Mrs. Hendrickson file amended returns under the same conditions set forth above within sixty (60) days of being released into Supervised Release, if she had not already done so.

9. As is obvious, the Court ordered Mrs. Hendrickson to file amended tax returns within thirty (30) days of the date of Entry of Judgment or be subject to immediate detention. At Mrs. Hendrickson's April 9, 2015, sentencing hearing, undersigned counsel objected to this condition of continued release. In addition, undersigned counsel clarified that this Court was adding this condition as a condition of continued release pending self-surrender. Mrs.

Hendrickson also objects to the filing of these dictated-content "amended returns" as a condition of Supervised Release. This issue, i.e., the appropriateness of this filing requirement as a condition of the supervised release, is not presently before the Court and will be addressed as part of Mrs. Hendrickson's challenge to her sentence.

10. These conditions of continued release constitute a blatant violation of Mrs. Hendrickson's Fifth Amendment right against self-incrimination. Additionally, these conditions of continued release are premised on the erroneous assumption that the theory outlined/detailed in Cracking the Code suggests that only "Federal, state or local government workers [are subject to the Federal income tax]". These conditions of release also implicate Mrs. Hendrickson's First Amendment Speech Rights. However, as explained below, the foul to Mrs. Hendrickson's Fifth Amendment rights is so palpable that it is not necessary to discuss in detail the other improper implications of these conditions.

11. At sentencing, the government - in particular, Department of Justice Attorney, Jeffrey A. McLellan - while discussing the § 3553 factors, strongly intimated that Mrs. Hendrickson's continued reliance on and public support of positions articulated in her husband's book, Cracking the Code, has effectively resulted in significant on-going tax loss to the United States of America.

12. Consequently, the government has strongly suggested that Mrs. Hendrickson's continued reliance upon and communication of the principles set forth in Cracking the Code constitute an ongoing crime to the extent that she is encouraging and/or theoretically conspiring with others to employ the positions set forth in Cracking the Code, which the government insists represent a knowingly wrongful interpretation of the Internal Revenue Code.

13. Compelling Mrs. Hendrickson to file amended tax returns, which contradict her

repeatedly sworn position concerning the taxable nature of the items to be reported as income, would essentially constitute a compelled attestation that her alleged historical failure to file returns as directed, or to file returns as she did, was willful. This would also constitute a forced agreement as to the lawfulness of Judge Edmunds's Orders, a position with which Mrs. Hendrickson takes umbrage.

14. Additionally, compelling Mrs. Hendrickson to file any amended tax returns for the years 2002 and 2003, without any qualification or caveat (such as were included on both previous occasions when she did in fact submit amended tax returns), would constitute a compelled admission that her originally filed 2002 and 2003 tax returns are incorrect, and even that they were false and fraudulent.

15. Further, both the government and the Court have suggested that Mrs. Hendrickson remains in violation of Judge Edmunds's Order, which serves as the basis for Mrs. Hendrickson's contempt.

16. To the extent that Mrs. Hendrickson's original 2002 and 2003 income tax returns are based upon positions articulated in Cracking the Code, any compelled attestation of belief as to the incorrectness of those positions could arguably be used against Mrs. Hendrickson in civil proceedings, a prosecution for additional crimes, or at a retrial should Mrs. Hendrickson succeed on appeal. Thus, the special conditions reducing Mrs. Hendrickson's period in which to self-surrender and coercing her production of the ordered "amended returns" clearly violate Mrs. Hendrickson's Fifth Amendment rights and the Order should be modified to eliminate these conditions of release.

17. A defendant's Fifth Amendment privilege not to be "compelled in any criminal case to be a witness against himself" (U.S. Const. amend. V) applies not only in a criminal trial

setting, "but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings.'" *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). "A defendant does not lose this protection by reason of his conviction of a crime." *Id.* Thus, Mrs. Hendrickson retains her Fifth Amendment right against self-incrimination even after being convicted and sentenced.

18. There are three elements to a valid Fifth Amendment claim; (1) compulsion, and that the evidence in question be (2) testimonial and (3) incriminating in nature. *See Fisher v. United States*, 425 U.S. 391, 408-09 (1976).

19. As the Supreme Court explained in *Minnesota v. Murphy* with respect to compulsion:

As this Court has long acknowledged "the Fifth Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."

Id. at 427 (quoting *United States v. Monia*, 317 U.S. 424, 427 (1943) (emphasis added)). So, for the Fifth Amendment to be implicated, the defendant must be *compelled* to incriminate himself. Compulsion occurs when "[the government] compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered." *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977).

20. Regarding the testimonial aspect of a Fifth Amendment claim, as the Court stated in *Fisher v. United States*, "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused

is compelled to make a Testimonial Communication that is incriminating." 425 U.S. 391, 408 (1976). *Fisher* stands for the rule that while a defendant being obligated to provide potentially incriminating documents to the government may not have Fifth Amendment implications, being compelled to create such a document - such as the Court directing Mrs. Hendrickson to file amended returns in the specified manner - does.³ *See Id.*

21. A defendant's statement is "incriminating" for Fifth Amendment purposes if, "whether inculpatory or exculpatory - [] the prosecution may seek to introduce it at trial." *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980) (citing *Miranda v. Arizona*, 384 U.S. 436, 476-77 (1966) ("No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner, it does not distinguish degrees of incrimination").

22. So, a court order that compels a defendant to create and sign a document which they must swear is true, correct and complete under penalty of perjury and that could be used as evidence against them at trial, violates the Fifth Amendment. This is precisely the import of the order issued by the Court in this case.

23. A district court is permitted to order a defendant released pending the execution of sentence pursuant to 18 U.S.C. § 3143(a). As the statute reads, in pertinent part,

³ The "testimonial" nature of the conduct ordered by the Court as a condition of release is further demonstrated by the fact in order to file such returns, Mrs. Hendrickson must affirm, "under penalties of perjury," that the information set forth there, to "the best of [her] knowledge and belief," is "true correct and complete." *See IRS Tax Form 1040*. Any tax return is a form for reporting *what the filer believes to be tax-relevant events* (or the revenues resulting therefrom). A return is never simply an indiscriminate report of all economic activity or the gains therefrom. This is obvious from the perjury statement on a Form 1040, which the Court directs cannot be altered.

the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition *or execution* of sentence . . . be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).

(Emphasis added). As indicated, Section 3143 permits a court to release a defendant pending "execution" of sentence so long as the same concerns that govern pretrial release - absence of flight risk and danger to persons and/or the community - are met, but at a clear and convincing standard. Thus, the same substantive analytical concerns that governs pretrial release governs post-sentence release.

24. As specifically mentioned in both Sections 3142 and 3143, the sole issue of concern governing the release of a defendant pretrial or post-sentencing are risk of flight and danger to persons or the community. While conditions can be placed on a defendant's release under Section 3142(c), these must be the "least restrictive" necessary and, again, can only be aimed at ensuring the defendant's appearance and the safety of persons and the community. 18 U.S.C. § 3143(c)(B). Otherwise, any such conditions cannot be punitive in nature. *See Williams v. Ward*, 567 F. Supp. 10 (E.D.N.Y. Aug. 11, 1982) (citing *Bell v. Wolfish*, 441 U.S. 520, (1979)).

25. As set forth herein, Mrs. Hendrickson retains her Fifth Amendment right against self-incrimination despite the fact that she has been convicted and sentenced. She fully intends to appeal her conviction and sentence and, if successful, may face trial again on these same charges. The Court directing Mrs. Hendrickson to file amended tax returns for 2002 and 2003 in the manner dictated within 30 days of the date of the imposition of sentence, or else immediately

be taken into custody, as opposed to having an additional 30 days to self-surrender, or as a condition of Supervised Release, obligates Mrs. Hendrickson to submit tax returns that could function as evidence of guilt in her underlying case and other possible cases. Thus, the Court's Order compels her to "be a witness against h[er]self" in violation of the Fifth Amendment.

26. The nature of the contempt charges that resulted in Mrs. Hendrickson's conviction - at least with respect to the allegation that she was in contempt for failing to file 2002 and 2003 returns as directed by Judge Edmunds' Order - hinge on the argument that in filing the amended returns in the manner that she did in 2010 and 2011, Mrs. Hendrickson willfully violated the Court's Order. *See Downey v. Clauder*, 30 F.3d 681, 686 (6th Cir. 1994) ("to support a criminal contempt conviction, the government must prove that the defendant willfully violated a 'lawful order of reasonable specificity'" (quoting *United States v. Robinson*, 922 F.2d 1531, 1534-35 (11th Cir.1991))). Were Mrs. Hendrickson now to file amended returns as directed by the court, this filing could be introduced at a later proceeding as evidence proving that her amended returns filed in 2010 and 2011 were, in fact, knowingly and willfully submitted in violation of Judge Edmunds' Order, and/or were perjurious.⁴ By obligating Mrs. Hendrickson to engage in this conduct, the Court's Order violates her Fifth Amendment rights.

27. The Court's Order violates the Fifth Amendment because it meets all three elements for such a constitutional violation. It is clearly compulsive, in that the Order explicitly directs Mrs. Hendrickson to file amended 2002 and 2003 returns and explains that if she does not do so, she will be sanctioned by immediate imprisonment for failing to comply with the Order.

⁴ As discussed above, Mrs. Hendrickson's Fifth Amendment rights extend not only to possible criminal prosecutions, but "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [her] in future proceedings." *Murphy*, 465 U.S. at 426 (quoting *Lefkowitz*, 414 U.S. at 77).

In other words, the Court is compelling Mrs. Hendrickson to submit the returns under penalty of immediate imprisonment. Nothing could be more compelling.

28. The Order also directs Mrs. Hendrickson to engage in testimonial action/conduct. The compelled creation of these tax returns goes right to the heart of the case against Mrs. Hendrickson and as the Court acknowledged in *Fisher*, while the production of documents to government officials may not be testimonial, the creation of a document can be. Were Mrs. Hendrickson to comply with the Court's Order, these returns could be admitted as evidence against her in subsequent proceedings for the proposition that she knew all along that her previously sworn returns, and various affidavits executed over the years regarding the content of those returns, were false. The returns ordered by the Court are, therefore, incriminating, in that their submission would serve as evidence that she submitted her previously-submitted amended returns in 2010 and 2011 contemptuously; that her original returns were false and fraudulent; and that her affidavits concerning all of these returns filed repeatedly over the years were also perjurious. Therefore, the Court's Order clearly violates Mrs. Hendrickson's Fifth Amendment rights.

29. In essence, the Court has conditioned Mrs. Hendrickson's continued release on confessing to the very criminal conduct which she adamantly denies.

30. As mentioned above, Mrs. Hendrickson has appealed her conviction and sentence. If successful, she could face retrial with respect to the allegations in this case. Thus, not only does the Court's Order violate Mrs. Hendrickson's Fifth Amendment rights in this respect, but the Government has maintained that she "continues to refuse to comply" with its terms. (Notes of Sentencing Hearing ("N.S."), 4/9/15, p. 26). Thus, the Order also implicates her rights with respect to other actions the government may take based on her continued alleged contempt of

Judge Edmund's Order.

31. Compelling Mrs. Hendrickson to create the ordered "amended returns" would also adversely affect her appeal, in that these returns would stand in direct contradiction to some of the positions she will argue on appeal.

32. Additionally, the Order in question could serve as evidence against Mrs. Hendrickson in other, unrelated matters, where she likewise would have a Fifth Amendment right. The government has repeatedly argued to the Court that Mrs. Hendrickson and her husband, in promoting Mr. Hendrickson's book, Cracking the Code, are responsible for "devis[ing] a scheme" that enables like-minded people to file false tax returns that have cost the government up to "\$11,605,323.00." (N.S., 4/9/15, p. 28-29). Therefore, there exist at least a theoretical possibility that the government may take action against Mrs. Hendrickson based on her alleged complicity in the hundreds - if not thousands - of tax crimes the government suggests result due to taxpayer reliance on Cracking the Code. The theoretical nature of such charges does not diminish Mrs. Hendrickson's Fifth Amendment concerns. As the Supreme Court has stated, "one of the Fifth Amendment's 'basic functions ... is to protect innocent [women] ... who might be otherwise ensnared by ambiguous circumstances'". *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (quoting *Grunewald v. United States*, 353 U.S. 391, 421 (1957) (further citation omitted).

33. The Court's decision to allow Mrs. Hendrickson to be released pending the execution of sentence is governed by 18 U.S.C. §§ 3142 and 3143. The Court could only have released her by finding by clear and convincing evidence that she was neither a flight risk nor a danger to the community. The condition the Court placed on her - that she file amended 2002 and 2003 tax returns - not only violates her Fifth Amendment rights, but has no bearing on the two valid considerations, which exclusively control whether someone should be released under

governing law.

34. Mrs. Hendrickson requests that the Court modify the Order governing her post-sentence release by rescinding the condition that she file amended 2002 and 2003 tax returns in a manner dictated by the Order. Mrs. Hendrickson is neither a flight risk nor a danger to any persons or the community - just as she was not during her pretrial and post-conviction release - and the conditions she is challenging are violative of her constitutional rights.⁵

WHEREFORE, the defendant, Doreen Hendrickson, respectfully requests that the Court modify the unlawful condition of her post-sentence release and permit her to surrender herself to BOP custody within 60 days of the date of her sentence without the condition directing her to file amended 2002 and 2003 tax returns within 30 days of her sentencing date.

Respectfully submitted,

CEDRONE & MANCANO, LLC

Dated: April 17, 2015

By:

/s Mark E. Cedrone

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⁵ Mrs. Hendrickson acknowledges that in response to her instant Motion, the Court could, in theory, decide to immediately order her taken into custody. Such an order would require disingenuous intellectual gymnastics to circumvent the Court's implicit findings that Mrs. Hendrickson is not a flight risk or a danger to the community, which the Court was required to conclude to delay execution of Mrs. Hendrickson's sentence, and which are the limited concerns that exclusively dictate whether she could be released at any point prior to the execution of her sentence.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served this 17th day of April, 2015, via the Court's Electronic Case Filing ("ECF") System, upon the following:

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