

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 :

**DOREEN HENDRICKSON'S REPLY TO THE GOVERNMENT'S
OPPOSITION TO DEFENDANT'S AMENDED MOTION FOR
MODIFICATION OF RELEASE CONDITIONS**

Recently, the government filed an Opposition to Defendant's Motion to Modify her Release Conditions. Mrs. Hendrickson, through her undersigned counsel, offers this short Reply.

As the Court knows, Mrs. Hendrickson argues the condition of her continued release pending execution of her sentence requiring that she file tax returns she believes to be untruthful, constitutes a violation of her Fifth Amendment privilege against self-incrimination and represents a condition of release well beyond that authorized by the Bail Reform Act and, specifically, 18 U.S.C. §§ 3142 and 3143.

In its Opposition, the government asserts that Mrs. Hendrickson's Fifth Amendment privilege against self-incrimination is not implicated by the condition of release in question. The government does not suggest the Court may impose a condition of release that violates a defendant's Fifth Amendment privilege. Hence, the government at least tacitly agrees with the proposition that a condition of release which violates a defendant's Fifth Amendment privilege would be inappropriate under 18 U.S.C. §§ 3142 and 3143.

The government, however, does argue that the condition of release of concern, i.e., that Mrs. Hendrickson file amended tax returns for 2002 and 2003 as ostensibly directed by Judge Edmunds, does not violate her Fifth Amendment privilege against self-incrimination. The

government's position/argument, however, is nonsensical.

In arguing that compliance with this condition of release does not run afoul of Mrs. Hendrickson's Fifth Amendment privilege, the government first suggests this Court rely upon the Recommendation issued by Magistrate Judge Whelan in 2010 when Judge Edmunds. However, since April 16, 2010 many things have happened, including the fact that Mrs. Hendrickson has been wrongfully convicted of criminal contempt and testified at least two times in a manner inconsistent with the now compelled sworn declaration.

The most palatable manifestation of a violation of Mrs. Hendrickson's Fifth Amendment privilege manifest itself in the prospect that Mrs. Hendrickson will seek, and hopefully secure, a new trial through the Sixth Circuit Court of Appeals. Any tax return which she is compelled to now file consistent with the directive of Judge Edmunds – and now this Court – would be a compelled statement of the accuracy of that return and, hence, a compelled statement as to the inaccuracy of any contrary position which Mrs. Hendrickson has taken in connection with the criminal case, and will take in connection with her expected retrial. Hence, there can be no question that compelling Mrs. Hendrickson to file tax returns as a condition of release implicates her Fifth Amendment privilege against self-incrimination.

Mrs. Hendrickson firmly believes in the accuracy of her original tax filings for 2002 and 2003. In essence, Judge Edmunds (and now this Court) has ordered Mrs. Hendrickson to authoritatively declare that she previously lied under oath.¹ Such a declaration contradicts not only her trial testimony in the two trials before this Court, but also her general theory of defense against the charges at issue in this case.

¹ Actually, unlike this Court, Judge Edmunds at least suggested Mrs. Hendrickson could qualify her compelled filings.

In its Reply, the government states:

Because [Mrs. Hendrickson] would be filing [the required returns] to comply with the Court's judgment, her conduct would lack the volitional element that is the cornerstone of willful conduct. Accordingly, the returns would not be evidence of her state and mind.

Government's Opposition, p. 8. However, to comply with the Court's Order, Mrs. Hendrickson is not permitted to qualify her statements in any way, shape or form. Therefore, absent immunity for the filing of these returns (something which the government could offer, but has not (which in and of itself suggests some likely future prosecution as outlined in Mrs. Hendrickson's initial Motion))², there are no limits on the evidentiary use that can be made of Mrs. Hendrickson's filing of tax returns in compliance with this condition of release – a condition which, in and of itself is not an appropriate under the Bail Reform Act.

The government suggests there exists no peril to Mrs. Hendrickson in filing the compelled returns and that the directive to do so falls within the Court's discretion. This is simply not the case. Judicial discretion as to the peril of testimony occurs when someone is simply being told to testify and suspects that what she feels she might say puts her in legal jeopardy, a situation in which it may be appropriate for an impartial judge to consider whether the fear is unfounded and the protection of the Fifth Amendment is needed. Here, Mrs. Hendrickson is being commanded – not simply to speak – but to declare herself to have previously committed perjury, not only when she filed her original returns, but when she testified before this Court at two separate trials. Clearly, the Court is directing Mrs. Hendrickson to place herself in legal jeopardy. This legal peril is inherent in the command that she testify, and is more than simply a possibility depending on what

² The government, interestingly, has not suggested that Mrs. Hendrickson's concerns about future prosecution are unfounded.

might or might not be said by some other witness in response to the normal testimonial command. Here, the Fifth Amendment protection arises automatically from the nature of the testimony that is being compelled.

A tax return is a report of the signers belief in the veracity of what is sworn to under penalties of perjury. Making one declare a belief that is contrary to one previously declared (especially a previously declared belief which the declarant believes to be truthful) makes that person declare herself to have committed perjury previously.

The government suggests that Mrs. Hendrickon's compelled filing of returns could not later be said to have been willful, yet she is not permitted to modify or qualify her statements in any way, shape, form. However, the government's argument misses the point. The compelled nature of the filing which might implicate whether it is filed willfully is only one variable in the Fifth Amendment equation. The more important variable is the statement of inaccuracy of prior sworn testimony contained in the compelled return. It is not only the act of filing the return that is testimonial. Here, the content contained in the compelled return is testimonial.

The government suggests that the Court has discretion to compel Mrs. Hendrickson, as a condition of release, to declare her multiple prior statement to have been perjurious. Yet, the government cites no case for this proposition, for it cannot. This is no different than if the Court were to say it would allow continued release provided Mrs. Hendrickson confessed to the crimes with which she was charged. There is no support for such a proposition.

For all of the above reasons, as well as those articulated in Mrs. Hendrickson's original Motion, this Court must modify the conditions of release imposed on Mrs. Hendrickson to the extent such conditions run afoul of her Fifth Amendment rights.

Respectfully submitted,

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Dated: April 30, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served this 30th day of April, 2015, via the Court's Electronic Case Filing ("ECF") System, upon the following:

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