IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| UNITED STATES OF AMERICA | : | |
| V. | : | MAGISTRATE NO. 15-850 |
| APPLE MACPRO COMPUTER | : | |

RESPONSE OF THE UNITED STATES TO CONTEMNOR'S
MOTION FOR STAY OF CONTEMPT ORDER AND FOR
RELEASE FROM CUSTODY AND TO VACATE THE ORDER OF CONTEMPT

## I. INTRODUCTION

The contemnor has for nearly two years refused to comply with an order of this Court directing him to produce a decrypted copy of a hard drive that law enforcement officers seized from his residence pursuant to a duly issued search warrant. Magistrate Judge Thomas Rueter held him in contempt for his failure to do so. He appealed and after a second hearing then-District Court Judge L. Felipe Restrepo held him in contempt also. He then appealed to the Court of Appeals, which affirmed the contempt order and his incarceration. Having failed in both courts, he returns to this one seeking release from custody and vacation of the contempt order. He does not offer to comply with the original order, nor does he assert that it is impossible for him to do so. Nevertheless, he asks the Court to allow him to go free.[1] The Court should deny the motions.

[1] The Yiddish word "chutzpah," which Leo Rosten defined in The Joys of Yiddish (1968 Washington Square Press) as "gall, brazen nerve, effrontery, incredible 'guts', presumption plus arrogance such as no other word and no other language can do justice to," certainly fits this case. Rosten gave as an example, "that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan." See https://en.wikipedia.org/wiki/Chutzpah, last checked on August 29, 2017.

## II. DISCUSSION

### A. Procedural History

After the government had seized the contemnor's computers and was unable to decrypt several of the hard drives, it filed a motion with Judge Rueter under the All Writs Act, 28 U.S.C. § 1651, for an order directing Rawls to produce a decrypted copy of the hard drives. The procedural posture is significant. The government did not proceed before the grand jury. It did not subpoena him as a witness. It did not ask him to tell the government the password. Rather, the government sought to compel him to perform a physical act to assist in the execution of the search warrant.

The contemnor contested the All Writs Act motion, but did not appeal the order. He then appeared at the time and place directed to produce decrypted copies of his devices and failed to do so. The government then moved to have him held in contempt under 18 U.S.C. § 401, not under 28 U.S.C. § 1826 (the statute that he cites.)[2] At the contempt hearings before Magistrate Judge Rueter and before Judge Restrepo, he did not raise his privilege against self-incrimination as a defense. Both judges found that he had the ability to decrypt the drives and held him in civil contempt.

He appealed and filed a motion asking the Court of Appeals to stay the order of contempt and release him from custody. (Court of Appeals Docket 15-3537, Document No. 003112305947). The Court of Appeals denied that motion on June 10, 2016. (Document No. 003112323302 (See Attachment A)). The Third Circuit affirmed the contempt order on March 27, 2016 after hearing oral argument. 851 F.3d 238 (3d Cir. 2017). It found that by failing to

[2] None of the government's filings have ever cited to 28 U.S.C. § 1826.

appeal the original All Writs Act order or to raise the Fifth Amendment as a defense to the contempt proceeding, he had procedurally defaulted on his Fifth Amendment challenge. As a result, it only reviewed the proceedings for plain error. *In re Apple MacPro Computer*, 851 F.3d at 246-47.

B. Legal Argument

1. The Contemnor is not a "Recalcitrant Witness" under 28 U.S.C. § 1826.

The government did not proceed under 28 U.S.C. § 1826, but under 18 U.S.C. § 401. The government deliberately chose not to call Rawls as a "witness" to minimize Fifth Amendment issues. Thus, the government did not seek to compel him to produce his password. Rather, it sought to compel him to perform a physical act. Although there is no dispute that the act had testimonial elements, he was brought into the proceedings as a person needed to perform an action to assist in the execution of the search warrant. Thus, all the discussion in his filings about the law under 28 U.S.C. § 1826 is irrelevant. His statement that "Section 1826(a) fixes the 18-month limit as an absolute maximum, with confinement authorized in certain circumstances only for shorter periods," (Document 47, p. 4) may be accurate, but it is irrelevant. His citations to decisions made under this statute are inapposite.

More appropriate for this Court's consideration are the decisions in *United States v. Harris*, 582 F.3d 512 (3d Cir. 2009), and *Armstrong v. Guccione*, 470 F.3d 89 (2d Cir. 2006). In *Harris*, the district court ordered the defendant stop filing bogus liens and judgments against judges and prosecutors. When he continued to make such filings, the district court held a contempt hearing. The defendant did not agree to cease and the court incarcerated him. He was also convicted of conspiracy and fraud charges and sentenced to 188 months in prison. However, the court made the sentence on the criminal conviction consecutive to the civil

contempt sentence. By the time the case got to the Court of Appeals, Harris has been in jail for five years on the contempt citation. He had not begun to serve the 188-month sentence.

On appeal, Harris asserted that because he had been incarcerated for five years, he was entitled to release. The Court rejected that argument, writing:

> We reject that contention. As an initial matter, it is critical to emphasize two undisputed facts: first, the underlying order, on the merits, is unquestionably valid and eminently appropriate; second, as Harris himself admits, he is able to comply with the order at any time. There is simply no better example of a situation where a contemnor "'"carries the keys of his prison in his own pocket." ' " *Bagwell,* 512 U.S. at 828, [*Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831(1994)] (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442, (1911) (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir.1902))).
> *United States v. Harris*, 582 F.3d 512, 516–17 (3d Cir. 2009) (footnote omitted)

The Court then distinguished *In re Grand Jury Investigation (Braun)*, 600 F.2d 420 (3d Cir. 1979), a case decided under 28 U.S.C. § 1826, and heavily relied upon by Rawls here. It wrote, "That statute is wholly inapplicable here for one obvious reason: Harris is not, and was not a recalcitrant witness." *Id.* at 517. As we noted above, while Rawls act of production of the decrypted computer would have testimonial elements, he was not called as a witness. He was ordered to perform a physical act. Before he sat down at the keyboard, he was not placed under oath.

Rawls argued in the Court of Appeals that the government should not have proceeded under the All Writs Act and that it had to call him before a grand jury. The Court of Appeals rejected that argument. *Apple MacPro Computer*, 851 F.3d at 244-45. He tries the same legal legerdemain here, converting his role as a court-ordered aider in the execution of a search warrant into that of a testifying witness.

The court went on to note that there is "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." 582 F.3d at 517, citing *Bagwell*, 512 U.S. at 828. The Court then quoted its earlier opinion in *Chadwick v. Janecka*, 312 F.3d 597, 608 (3d Cir. 2002):

> 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. Mr. Chadwick's contrary interpretation—that 'indefinitely until he complies' means 'indefinitely until he complies or it becomes apparent that he is never going to comply'—is insupportable.
> *United States v. Harris*, 582 F.3d at 518 (3d Cir. 2009)

The Court concluded writing the following that applies well here:

> In the final analysis, we simply cannot countenance a situation where a contemnor's insistence on continuing his contumacious conduct inures to his benefit, and we surely do not believe that the Constitution requires such a result. To the contrary, a valid order of civil contempt does not become punitive simply because the contemnor persists in punishing himself. We, therefore, hold that an order of civil contempt will only become punitive if a contemnor is unable to comply with the order, or if the circumstances indicate that a court is maintaining the contempt for an impermissible punitive purpose.
> *United States v. Harris*, 582 F.3d at 520

In *Armstrong v. Guccione,* 470 F.3d 89, Armstrong was subject to an order from a court-appointed receiver to return items he had allegedly looted from a corporation that he controlled. When he refused to produce all the items, the district court held him in contempt. He defended the contempt action, asserting that his act of production of the items would violate his Fifth Amendment privilege against self-incrimination. Because he was acting as a corporate custodian, both the district court and the court of appeals rejected that claim, citing *Braswell v. United States*, 487 U.S. 99 (1988). *Armstrong*, 470 F.3d at 97-100.

The court began by rejecting the claim that 28 U.S.C. § 1826 governed the case, writing, "First, Armstrong is not a 'witness' under the Fifth Amendment." *Id.*, at 108. While the court relied upon *Braswell*'s holding that a custodian of corporate property may not invoke the Fifth Amendment privilege against compelled production of corporate property, the ruling of the Court of Appeals in this case is analogous. Armstrong had no privilege because of a blanket rule covering all custodians of corporate property. Rawls has no privilege because of a narrow, fact-bound conclusion that his act of production only communicates information already known to the government (a "foregone conclusion").[3] In neither case was the contemnor a witness within the meaning of 28 U.S.C. § 1826.

Although Armstrong had been in prison on the contempt charge for almost seven years at the time of the decision, the Second Circuit had no problem holding that he should remain in custody. Citing *Bagwell*, the court recognized that a court may jail a contemnor "indefinitely, until he complies." *Id*. at 110. While the court noted that when the contemnor is no longer able to comply, the incarceration would be punitive. However, the burden of producing evidence of that would be on the contemnor. *United States v. Rylander*, 460 U.S. 752 (1983).

The *Armstrong* court found that the value of the property concealed ($15 million) was a significant factor in Armstrong's decision process "to the extent that it would lead the contemnor to conclude that the risk of continued incarceration is worth the potential benefit of

[3] In *Braswell*, the Supreme Court held that "the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian." 487 U.S. at 118. The government believes that a similar rule applies to Rawls in this case.

securing both his freedom and the concealed property." *Armstrong*, 470 F.3d at 111. For Rawls, the calculus is just as strong, not because of what he might gain, but because of what he might lose. The search warrant showed probable cause to believe that Rawls had violated 18 U.S.C. § 2251(a), a crime carrying a 15-year mandatory minimum sentence, 18 U.S.C. § 2252(a)(2), receipt of child pornography, a crime carrying a 5-year mandatory sentence, and 18 U.S.C. § 2252(a)(4)(B), possession of child pornography. For Rawls, compliance risks a lengthy period of incarceration. It is not unreasonable to conclude that only 2 years into his confinement, he still thinks that is time worth serving if further contumacious behavior can spare him the mandatory sentences.[4]

2. The Court Should Not Release Rawls Pending A Decision on a Petition for a Writ of Certiorari to the Supreme Court.

Rawls asks the court to release him while he appeals to the Supreme Court. This request has no merit. When he appealed to the Third Circuit (an appeal of right), that court denied his request for a stay of the contempt order and for his release. He has now lost in two courts. He has no right to an automatic appeal to the Supreme Court; any appeal is discretionary with the Supreme Court. 28 U.S.C. § 1254; Supreme Court Rule 10. While Rawls is correct when he writes that *if* he wins in the Supreme Court, the contempt citation will be vacated, the conditional phrasing is significant. He must first convince four justices of the Supreme Court to grant certiorari to review an issue that he has procedurally defaulted. Assuming he clears that hurdle, he must convince five justices to reverse the decision below. The Court of Appeals found no basis to release him pending a decision on his appeal of right. There is even less reason to do so now. This court should follow the guidance of *Harris*, when the court wrote,

[4] There is no statute of limitations for child pornography violations 18 U.S.C. § 3299

"In the final analysis, we simply cannot countenance a situation where a contemnor's insistence on continuing his contumacious conduct inures to his benefit. . ." *United States v. Harris*, 582 F.3d at 520.

We do suggest however, that the Court use this opportunity to ask the contemnor again if he now wishes to decrypt the hard drives. It is fitting that the Court should periodically make such an inquiry to insure that Rawls is still unwilling to comply with the Court's order.

## III. CONCLUSION

For the foregoing reasons, the Court should deny the motion.

Respectfully submitted,

LOUIS D. LAPPEN
Acting United States Attorney

*/s/ Michael L. Levy*
MICHAEL L. LEVY
MICHELLE ROTELLA
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the government's Response of the United States to Contemnor's Motion for Stay of Contempt Order and for Release from Custody and to Vacate the Order of Contempt upon the following by filing it with the Court's Electronic Case Filing System:

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August 30, 2017.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

May 17, 2016
BCO-084-E

No. 15-3537

UNITED STATES OF AMERICA

v.

APPLE MACPRO COMPUTER,
APPLE MAC MINI COMPUTER,
APPLE I PHONE 6 PLUS,
ELLULAR TELEPHONE WESTERN DIGITAL
MY BOOK FOR MAC EXTERNAL HARD DRIVE,
Western Digital My Book Velociraptor Duo External Hard Drive

*John Doe,
Appellant
*(Pursuant to Rule 12(a), Fed. R. App. P.)

(E.D. Pa. No. 2-15-mj-00850-001)

Present: FUENTES and KRAUSE, Circuit Judges

1. Motion by Appellant to Stay Order of Civil Contempt Entered in District Court Pending Appeal and Accordingly to Order Appellant be Released from Custody Pending Resolution of Appeal with Exhibits;

2. Sealed Motion by Appellant to Seal Exhibits to Motion to Stay Order of Civil Contempt;

3. Motion by Appellee to File Response to Motion to Stay Order of Civil Contempt out of Time;

4. Response by Appellee In Opposition to Motion to Stay Order of Civil Contempt Entered in District Court Pending Appeal and Accordingly to Order Appellant be Released from Custody Pending Resolution of Appeal with Exhibits;

5. Reply by Appellant to Government's Response to Motion to Stay Order of Civil Contempt Pending Appeal.

Respectfully,
Clerk/pdb

_____ORDER_____

Upon consideration of the foregoing motions:

The Appellant's motion to stay the order of civil contempt is denied;

The Appellant's motion for leave to file exhibits under seal is granted;

The Appellee's motion to file out of time is granted.

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: June 10, 2016
PDB/cc: All Counsel of Record