NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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May 20, 2021

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Re: ***David B. Burt v. Kristine B. Burt***
Case No. CL–2021–351

Dear Counsel:

The issue before the Court is whether the 5th Amendment to the United States Constitution protects a party from producing in discovery incriminating documents that could prove adultery.

The Court holds the 5th Amendment does not generally protect a party from producing personal, incriminating material in response to a civil subpoena *duces tecum*. While the Court

OPINION LETTER

acknowledges a big exception to this principle—where the act of document production is itself incriminating—the Court finds this "act of production privilege" mostly inapplicable in the present case. Therefore, the Court will grant in part and deny in part the pending "Motion to Quash Subpoena *Duces Tecum*."

I. FACTUAL OVERVIEW: SEEKING PROOF OF ADULTERY.

David B. Burt ("Husband") sued Kristine B. Burt ("Wife") for divorce based on the two of them living separate and apart. Wife counterclaimed, alleging adultery by Husband. Wife issued a Subpoena *Duces Tecum* ("Subpoena") to Vanessa Gannon ("Gannon"), the alleged paramour.

The Subpoena demanded three categories of documents. The first category consists of general private correspondence between Husband and Gannon.[1] The second category consists of general banking and financial records for accounts Gannon has in common with Husband.[2] The third category consists of specific banking and other documents "evidencing any and all expenditures you have incurred with respect to any restaurants, food, lodging or gifts you have incurred in furtherance of your relationship with [Husband]."[3]

Gannon moved to quash the Subpoena, alleging that since she, too, is married, she has a 5th Amendment privilege against self-incrimination as to the subpoenaed documents relating to her alleged adultery.

II. THE 5TH AMENDMENT DOES NOT GENERALLY PROTECT AGAINST DISCLOSURE OF PRIVATE, INCRIMINATING WRITINGS.

Divorcing parties frequently allege adultery as a cause of the dissolution of the marriage. It is a specific ground for divorce. VA. CODE ANN. 20-91(A)(1). Despite its commonplace presence in civil divorce actions, and the fact that it is almost never prosecuted in criminal court, adultery is still, technically, a crime in Virginia. VA. CODE ANN. § 18.2-365. As a result, parties frequently demand discovery from an opponent to prove adultery, and the opponent just as frequently demurs using the 5th Amendment right against self-incrimination. U.S. CONST.

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[1] The Subpoena demands: "Copies of any and all correspondence to and/or from David B. Burt, to include, but not limited to, text messages; emails; photographs; video recordings; notes; cards; social media posts or private messages; whether in paper or electronic form."

[2] The Subpoena demands: "Copies of statements for all banking or credit card accounts with [Husband], including accounts where [Husband] is an 'authorized user'; information as to any monies received from or loaned/given to [Husband]."

[3] The Subpoena demands: "All bank statements, credit card statements or other documents evidencing any and all expenditures [Gannon has] incurred with respect to any restaurants, food, lodging or gifts you have incurred in furtherance of your relationship with [Husband]."

AMEND. V. ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").[4]

It is clearly settled that the 5th Amendment protects one against compelled self-incrimination. *Id.* The government cannot compel one to testify against herself or to *create* incriminating, testimonial evidence. *United States v. Fisher*, 425 U.S. 391, 409-10 (1976). The Amendment does not protect against the compelled *disclosure* of existing, private information in a person's possession—even when that information contains incriminating information. *Id.*; *Johnson v. United States*, 228 U.S. 457, 458 (1913) ("[a] party is privileged from producing the evidence, but not from its production."). Thus, if a person creates an incriminating document without government compulsion, that document is not generally protected by the 5th Amendment because the government did not compel the person to create it—she did so on her own volition. *Fisher,* 425 U.S. at 409-10.

Relatedly, the 5th Amendment does not protect one's private, personal documents on general privacy grounds. *Id.* at 401. Thus, even one's personal diary may be subject to compelled disclosure. *Moyer v. Commonwealth*, 33 Va. App. 8 (2000).

III. THE 5TH AMENDMENT PROTECTS AGAINST DISCLOSURE OF DOCUMENTS WHERE THE ACT OF PRODUCTION IS INCRIMINATING.

There are circumstances where the act of producing a document is itself incriminating, independent of any incriminating materials within the document. In such a case, the document is protected by the 5th Amendment. *United States v. Doe*, 465 U.S. 605, 612 (1984) ("Although the contents of a document may not be privileged, the act of producing the document may be.") An obvious example of such a circumstance would involve a subpoena for a bag of cocaine. It is impossible to comply with that subpoena without the responding party admitting to possession of contraband. Clearly, in some circumstances, compelled compliance with a subpoena could itself incriminate a person. *Fisher* lists some example categories: authenticity, existence, or possession by the defendant. 425 U.S. at 410.

Thus, there is a tension between *Fisher* and *Doe*. *Fisher* permits the subpoenaing of incriminating documents, but the *Doe* "act of production doctrine" protects a responding party from complying with the subpoena if the act of complying is itself incriminating. *Doe* could be the exception that swallows the *Fisher* rule. However, *Doe* resolves this issue by deferring to the trial court, on a case-by-case basis, for a factual determination of whether the act of responding to a subpoena is incriminating. *Doe*, 465 U.S. at 613-14. Trial courts discharge their responsibility by ruling on whether enforcement of a subpoenaed document would be both testimonial and incriminating. *Id.* at 613 (citing *Fisher*, 425 U.S. at 410).

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[4] Despite the express language, the 5th Amendment applies to both civil and criminal cases. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924). It applies to the states through the 14th Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

Because applying *Doe* can be so tricky, courts often bypass the issue of whether there exists any incriminating aspect of subpoena compliance. They point to ways a responding party does not need to do anything testimonial to comply with a particular demand. For example, the Court of Appeals of Virginia permitted the seizure of a diary containing incriminating statements by the defendant, over a *Doe* objection, because it was the product of a search and seizure, not a subpoena. *Moyer*, 33 Va. App. 8 (2000). The appellate court rationalized that the police seized the diary pursuant to a warrant. Therefore, the defendant did not need to produce or authenticate anything. Similarly, in this circuit, a judge permitted a party in possession of another's computer to unlock the files over the owner's objection. The computer owner claimed a privilege against self-incrimination. In overruling the objection, the court reasoned that *Doe* did not apply because the requesting party already possessed the computer and needed nothing from the owner. The requesting party merely wanted Court permission to unlock the files—an action the requesting party could accomplish on his own. Because the owner did not need to do anything testimonial for the requesting party to access his files, the act of accessing the computer could not itself incriminate the owner. *Albertson v. Albertson*, 73 Va. Cir. 94 (Fairfax 2007). Another circuit court deflected the "act of production" issue by finding an incriminating letter mailed by a defendant to a prosecutor shattered the *Doe* objection because the prosecutor could authenticate the letter he received without the defendant's further assistance. *Commonwealth v. Smith*, 37 Va. Cir. 291 (Prince William 1995).

However, courts are not required to quash all subpoenas by bypassing the *Doe* rule. *See, e.g., U.S. v. Fishman*, 726 F.2d 125, 127 (4th Cir. 1983). And, the 5th Amendment right against self-incrimination does not protect one's private writings with one's mere assertion that they contain something incriminating. *Fisher*, 425 U.S. at 410. A person seeking *Doe* protection must credibly allege that the act of disclosure of a document is itself incriminating. As discussed below, Gannon failed to do this in the present case.

IV. APPLYING *FISHER* AND *DOE*, THE COURT GRANTS-IN-PART THE MOTION TO QUASH THE SUBPOENA *DUCES TECUM*.

Gannon raised only two bases for objecting to the Subpoena under the 5th Amendment. First, in her brief, she argued that the substance of the material demanded was incriminating. *Fisher* easily dispatches with this objection. "[Gannon] cannot avoid compliance with the subpoena merely by asserting that the item of evidence which [she] is required to produce contains incriminating writing, whether [her] own or that of someone else." *Fisher*, 425 U.S. at 410.

Second, and raised for the first time in oral argument, she argues that her production of the requested materials would authenticate them and, thus, incriminate her in violation of the 5th Amendment as interpreted by *Doe*. However, she introduced no evidence and made no proffer of facts demonstrating how the act of production and authentication would incriminate her in this case. Since she is moving to quash the Subpoena, she has the burden of proof on this point. *See U.S. v. Wujkowski*, 929 F.2d 981, 985 (4th Cir. 1991). The Court is required to make fact findings to adjudicate these case-by-case issues. *Doe*, 465 U.S. at 613-14. Obviously, the parties

to a motion must present or proffer the necessary facts. "Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Our Lady of Peace v. Morgan*, 297 Va. 832, 856 (2019) (Mims, J., concurring in part) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring)). Thus, the Court is left with viewing the requests on their face to conclude whether the 5th Amendment applies to each request or not.

On this basis, the Motion to Quash the demand for documents "evidencing any and all expenditures you have incurred with respect to any restaurants, food, lodging or gifts . . . *in furtherance of your relationship with [Husband]*" will be granted. (Emphasis supplied). The final clause of this demand requires Gannon to review a number of financial records and not only produce them, but to curate them—to create a subset of the universe of Gannon's financial records that could tend to prove her relationship with Husband. This act of curation is, itself, testimonial self-incrimination. *See In re Antitrust Grand Jury Investigation*, 500 F. Supp. 68 (E.D. Va. 1980). If the Court upholds the Subpoena, it will require Gannon to pick out those items showing a furtherance of her relationship with Husband. This is a fresh testimonial act, not mere production of already existing evidence. The 5th Amendment protects Gannon from making this incriminating testimonial act.

The Motion to Quash the balance of the Subpoena will be denied. Gannon offered no evidence and proffered no facts to help the Court conclude that production of the various correspondence,[5] money received or loaned, or financial records would themselves be incriminating. Her only argument consists of the conclusory statement that production would establish authentication.

Gannon did not explain how, specifically, the production of any particular item would, itself, be incriminating on authentication grounds. *See Fishman*, 726 F.2d at 127. For example, if Gannon possessed a photograph of her kissing Husband embedded in a text message communication she had with Husband, the photo would be clearly incriminating. However, the Court must then use its imagination to conclude how the act of production of that photograph pursuant to the Subpoena would separately incriminate Gannon. Gannon argues that production forces her to authenticate the photo. However, production in discovery of the photo is not inherently incriminating as would be the bag of cocaine the Court used in its hypothetical. It is not illegal to possess a photo as it is to possess cocaine. Stated differently, Gannon's production of the photograph in discovery is not obviously incriminating by her authenticating it—the image in the photograph, itself, is what is incriminating.

In any event, the items demanded in the Subpoena are all materials that can be authenticated elsewhere. *See Fishman*, 726 F.2d at 127. Text messages, emails, social media posts, private messages, and banking and financial records may be authenticated, without Gannon's assistance, through the service providers.

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[5] Under the umbrella of correspondence, Wife seeks photographs and videos. Presumably, these are limited to photographs and videos that are themselves correspondence and not stand-alone images.

While not really addressed by Gannon, authentication is not the only category of situations wherein the compliance with a subpoena could be, itself, incriminating.[6] Compliance can result in compelled self-incrimination by requiring the disclosure of otherwise unknown incriminating evidence, or of the party's possession of it. *Fisher*, 425 U.S. at 410. The Court can imagine cases where producing a completely unknown piece of evidence could be incriminating. However, as with the authentication issue, Gannon did not offer evidence or a proffer of how her act of compliance with the Subpoena would specifically incriminate her in this case. The Court cannot make its fact finding in her favor, as was performed in *Doe. Doe*, 465 U.S. at 613-14. It finds she failed to carry her burden and did not prove her allegations.

V. CONCLUSION.

The Court holds that incriminating materials in Gannon's possession are not generally protected from disclosure on Wife's Subpoena pursuant to the 5th Amendment. It finds that Gannon failed to prove that the act of complying with the Subpoena would itself be incriminating, with one exception. The Court will quash the Subpoena demand that Gannon curate her financial records for items that specifically show the furtherance of her relationship with Husband. The Court will deny the balance of the Motion to Quash.[7]

An appropriate Order is attached.

[redacted]
David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

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[6] Gannon did not raise authentication, existence, or possession in her brief—or even cite to *Doe*. The Court only recalls her arguing authentication at oral argument. She did object to Wife's Subpoena categorically amounting to a "fishing expedition" in her brief, but that was in the context of her separate objection to the Subpoena based on the scope of the demand. Thus, the Court raises the issue of existence and possession just to be thorough.

[7] In addition to her 5th Amendment challenge to the Subpoena, Gannon objects to the scope of the Subpoena. She asserts it is overly broad, unduly burdensome, not narrowly tailored, and is a "fishing expedition." She points out that it seeks 3 years of materials. The Court denies the Motion to Quash on this basis. Gannon conceded at oral argument that there may not be many, if any, responsive documents. In any event, the Court does not find the request to be generally improper. Wife may need this information to prove at least two equitable distribution factors. *See, e.g.*, VA. CODE ANN. § 20-107.3(E)(7), (10). For her part, Wife makes the argument that the Motion to Quash should be dismissed as untimely. However, the applicable rules do not set firm deadlines. They used ambiguous terms such as "timely" and "promptly." S. CT. VA. R. 4:9A(a)(2) and 4:9A(c)(3). The Court cannot say the Motion to Quash was untimely or not made promptly.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

DAVID B. BURT, *Plaintiff*,	)	
v.	)	CL–2021–351
KRISTINE B. BURT, *Defendant*.	)	

ORDER

THIS MATTER came before the Court May 14, 2021, on third party Vanessa Gannon's ("Gannon's") "Motion to Quash Subpoena *Duces Tecum*" ("Motion to Quash"). And, for the reasons set forth in the accompanying Opinion Letter dated May 20, 2021, which is incorporated herein by reference; it is

ORDERED the Motion to Quash is GRANTED IN PART and DENIED IN PART; it is

ORDERED the Motion to Quash is GRANTED as to the request that Gannon curate her financial records to items she has "incurred in furtherance of [her] relationship with David B. Burt";

ORDERED the balance of the Motion to Quash is DENIED; and

ORDERED each party is to pay his or her own attorney fees.

AND THIS CAUSE CONTINUES.

MAY 20 2021

[redacted]

Entered

Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA. ENDORSEMENT OBJECTIONS MUST BE FILED WITHIN 15 DAYS.