

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

January 16, 1997

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324c Proceeding
) OCAHO Case No. 96C00027
PEDRO DOMINGUEZ,)
Respondent.)
_____)

**ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION TO COMPEL ANSWERS TO
DEPOSITION QUESTIONS**

I. Background

On December 18, 1996, Complainant filed a Motion to Compel Answers to Complainant's Deposition Questions Propounded to Mrs. Bertha Dominguez and to Impose Sanctions for Abusive Practices at Deposition ("Motion to Compel"). During the deposition, which was conducted on November 25, 1996, Mrs. Bertha Dominguez invoked her Fifth Amendment privilege against self-incrimination 57 times. Complainant's Motion to Compel argues that Mrs. Dominguez had failed to "state a factual picture in which the [Fifth Amendment] privilege is claimed." Complainant's Motion to Compel at 3. Counsel for Mrs. Dominguez counters that there is sufficient information at hand to allow an informed ruling on the privilege claims.

Complainant's Motion to Compel also asks this Court to sanction counsel for Mrs. Dominguez for behavior engaged in during the instant deposition. An analysis of that part of Complainant's Motion will be addressed and a ruling will be issued in a separate Order.

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II. *Legal standards regarding the invocation of the Fifth Amendment's guarantee against self-incrimination*

Complainant's Motion to Compel contains extensive citation and discussion regarding the invocation of Fifth Amendment rights in a civil context. *See, e.g.*, Complainant's Motion to Compel at 3-5. Complainant will be pleased to discover that this Court is in complete agreement with her discussion of the various legal standards and theories. This is because portions of Complainant's discussion of such standards are taken verbatim from this Court's ruling in *United States v. Carter*, 6 OCAHO 897 (1996), although citation to that case does not appear anywhere in Complainant's Motion to Compel. However, this Court differs with Complainant with respect to the application of these legal standards as to some of the deposition questions.

This Court has recently articulated the legal standards for the proper invocation of the Fifth Amendment in OCAHO proceedings. *See, e.g.*, *Carter*, 6 OCAHO 897 at 2-5; *United States v. Davila*, 6 OCAHO 903 at 1-4 (1996) (utilizing same rationale as *Carter* and discussing relevance of statute of limitations for criminal document fraud prosecution). Therefore, the legal standards discussed there are incorporated by reference. Suffice to note, however, is the general rule that "[t]he protections of the Fifth Amendment may only be invoked in response to questions that present a real and appreciable danger of self-incrimination." *Davila*, 6 OCAHO 903 at 2 (internal citations and quotation marks omitted). The Fifth Amendment's protections extend to evidence that would provide "a link in the chain of evidence needed to prosecute." *Malloy v. Hogan*, 378 U.S. 1, 11 (1964). The risk of prosecution must be credible, but remoteness of risk is not a bar to the invocation of the privilege. *Davila*, 6 OCAHO 903 at 3 (internal citations omitted).

III. *Rulings on Complainant's Motion to Compel concerning Respondent's objections based on self-incrimination*

A. *Deposition questions to which Complainant's Motion to Compel is granted*

92-8¹ **[W]as there a file cabinet in your home?**

¹The numerical references are the page and line, respectively, of the deposition transcript.

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- 93-17 **Did your husband ever bring work home?**
- 94-2 **Did your husband have a work space in your home on Plymouth Street?**
- 95-4 **Did you ever see any I-94s in your home on Plymouth Street?**
- 95-17 **Did you ever see any Immigration documents of any nature in your home on Plymouth Street?**

These questions seek apparently innocuous information. How the presence of a file cabinet and/or a work space in Respondent's home or the Respondent's possible practice of bringing work home could be characterized as incriminatory is difficult for this Court to understand. Mrs. Dominguez, however, has not addressed why the first three questions could pose even a remote risk of criminal prosecution. Moreover, Respondent has not demonstrated why an I-94 form is so inherently prejudicial that Bertha Dominguez would face a risk of future prosecution. Finally, why Mrs. Dominguez' having seen "any immigration document[] of any nature" would be incriminatory was likewise not proven to generate a significant risk of prosecution. The party invoking the Fifth Amendment privilege against self-incrimination bears the burden of proof the privilege exists. *United States v. Noriega-Perez*, 5 OCAHO 777 at 3. (1995). With respect to these questions, Mrs. Dominguez has failed this burden, therefore Complainant's Motion to Compel is GRANTED.

- 95-21 **Did you ever see any Social Security cards at your house on Plymouth Street?**

Complainant's Motion to Compel is GRANTED as to this question *only* to the extent that Respondent may answer if she saw Social Security cards of Pedro Dominguez, any child of hers, or her own Social Security card at the home on Plymouth street. If Mrs. Dominguez were compelled to testify as to Social Security cards which did not belong to family members, this evidence could be used to form a link in the chain of evidence needed to prosecute her based on an accessorial liability theory, by showing that she had reason to suspect criminal activity.² Such a risk might be remote, but this risk

² Certainly, it is not a commonplace household occurrence to have Social Security cards of unrelated individuals in the home.

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exists nonetheless, and therefore any question as to Social Security cards of non-family members is objectionable. However, since Complainant's question asks about "any" Social Security cards, and since Mrs. Dominguez has not shown why a discussion of her having seen Social Security cards of family members would be prejudicial, Complainant's Motion to Compel must be granted to a limited extent.

95-25 Did you ever see any inks, or stamps or paper of any nature at your house on Plymouth Street?

This question is very broad and is not limited to any particular type of inks, stamps or paper (e.g. on its fact it encompasses postage stamps, writing paper, etc.). Moreover, it only calls for a "yes" or "no" answer. Because of the breadth of the question, an affirmative answer to this question is not incriminatory. Therefore, Complainant's Motion to Compel is GRANTED. However, Mrs. Dominguez retains the right to object to any questions seeking information as to any inks, stamps, and paper relating to immigration, or Pedro Dominguez's activities with such materials relating to his criminal conviction.

96-15 And you can't tell me what [Respondent] did on a daily basis?

98-19 Who picked up the mail from your home on Plymouth Street?

99-3 Did you ever notice any mail coming to your home in Spanish?

99-11 Did you ever notice any mail coming from people you did not know?

104-7 Did you use any other mailing address other than your home on Plymouth Street?

104-13 What was the last mailing address you have used?

With respect to these questions, the Complainant's Motion to Compel is GRANTED. Counsel for the witness has not articulated a reasonable basis for Mrs. Dominguez's fear of future criminal prosecution were she compelled to answer these questions. Question 96-15 is simply a question as to the work duties of Respondent in the course of his position as a border patrol agent, the content of which Mrs. Dominguez has not proven could be of such a nature as

to give rise to even a remote possibility of criminal prosecution. As for Question 98–19, while it is possible to envision an answer that would provide a “link in the chain of evidence” that would imperil this witness to possible criminal prosecution, Mrs. Dominguez has not met her burden of proof that this is so. As for the remaining questions, the witness has again not met her burden of proof. It is certainly possible that the Respondent and witness, living in San Antonio, could have received mail in Spanish. Furthermore, receiving mail from an unrecognizable person is a part of normal life. The possible connection between these questions, and possible answers to them, is too attenuated to satisfy the Fifth Amendment privilege, absent more input from the witness. Mrs. Dominguez has simply not met her burden of proof regarding this question.

104–20 **Do you know Juanita Ovila?**

104–25 **Have you ever received any mail from Juanita Ovila?**

These two questions differ from those at questions 101–16 to 104–3, *infra*. Each set, however, details instances where the Complainant has asked Mrs. Dominguez to answer questions about her knowledge of certain individuals and her husband’s dealings with them. As will be discussed *infra*, some of these questions warrant Mrs. Dominguez’s invocation of the Fifth Amendment privilege against self-incrimination. However, the above two questions do not. The burden of persuasion that the Fifth Amendment privilege has been properly invoked is on the party invoking the privilege. *United States v. Noriega-Perez*, 5 OCAHO 777 at 3. Here Respondent has not shown who Juanita Ovila is, nor why receipt of mail from her would possibly provide a link in a chain of evidence to prosecute the witness. It is the witness who bears the burden of proving why answers to these questions could be prejudicial to her future liberty. Having failed to do so, the witness has waived any Fifth Amendment privilege she may have had regarding these questions. Complainant’s Motion to Compel is GRANTED as to these questions.

107–13 **Did your husband ever work undercover?**

Because this question only seeks to discover whether Respondent worked undercover, but not the circumstances surrounding such work, there is only an attenuated link between the witness’ possible answer and the future possibility of the witness’ criminal prosecu-

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tion. Follow-up questions to the witness' response may very well be privileged, but this question only seeks a "yes" or "no" answer. Moreover, as discussed above, it is the party asserting the privilege that bears the burden of proving its incriminatory nature. The witness has failed to prove that this question has any incriminatory potential. Therefore, Complainant's Motion to Compel is GRANTED as to this question.

112-25 Do you have an answering machine at 406 Plymouth?

It is undisputed that there is an answering machine at the home of the witness. Indeed, during the deposition, the witness tacitly confirmed this. *See* Dep. of Bertha Dominguez at 120. Thus, the witness appears to have waived her objection to this question during the latter part of the deposition. Moreover, the witness has not carried her burden of proving why acknowledging that there was an answering machine in her home the night of her husband's arrest would expose her to the danger of criminal prosecution. The witness has failed to enlighten the Court as to this point. Furthermore, it is difficult to envision how the witness' recollection of the events on the night her home was searched could expose Mrs. Dominguez to criminal liability, and the witness has not carried her burden of showing any self-incrimination danger. Accordingly, Complainant's Motion to Compel with respect to these questions is GRANTED.

118-24 What do you recall from the evening of the search warrant?

The witness has not met her burden of proving why her memories of the evening her home was searched, when confined to a mere recitation of her recollection of the events of that evening, would be incriminating. As the burden of proof is on the party claiming the privilege, and as the Court cannot divine what liability Mrs. Dominguez could reasonably fear as a result of her testimony, Complainant's Motion to Compel is GRANTED with respect to this question.

112-11 After your shift closed then what did you do?

115-11 Why weren't you allowed in the house for three hours?

128-16 Have you yourself been involved in any lawsuits?

Counsel for Mrs. Dominguez informed the Court in his response to Complainant's Motion to Compel that objections to these questions are waived. *See* Response of Bertha Dominguez to Complainant's Motion to Compel at 8 n.2. The Court therefore GRANTS Complainant's Motion to Compel and compels the witness to answer the above questions.

B. Deposition questions to which Complainant's Motion to Compel is denied

- 97-19 **Did you ever see your husband making Immigration documents?**
- 99-19 **Did you ever take any phone orders for any Immigration documents?**
- 100-3 **Did anyone ever make any deliveries to you of Immigration documents?**
- 100-12 **Did you ever order any stamps that could be used to make Immigration documents?**
- 100-20 **Did you ever use your credit card to order any stamps?**
- 101-1 **Did you ever file any documents relating to your husband's counterfeiting of Immigration documents at your home on Plymouth Street?**
- 101-6 **Did you ever create a filing system for him?**
- 118-17 **After your husband was arrested did you ever communicate with any of his distributors or document buyers?**

If Mrs. Dominguez were to hypothetically answer these questions in the affirmative she would be liable for criminal prosecution as an accessory to document fraud under 18 U.S.C. §1001 (providing for fines and/or imprisonment for anyone who, "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry"). Previously, the

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Respondent pled guilty to conspiracy to violate 18 U.S.C. §1546(a)³ in violation of 18 U.S.C. §371.⁴ Mrs. Dominguez could reasonably fear future possible prosecution under *any* of these sections, absent a grant of immunity. Indeed, it is clear that even an explanation as to *why* Mrs. Dominguez should not answer these questions could telegraph incriminatory information to the Complainant. There is little the witness needs to explain to understand how certain answers to these questions could give rise to a future criminal prosecution. Accordingly, Complainant's Motion to Compel answers to these questions is DENIED.

- 101-16 **Julian Banda Becerra, do you know who this person is?**
- 101-25 **Did you ever personally meet Mr. Banda Becerra?**
- 102-9 **Did Mr. Banda Becerra ever come to your home?**
- 102-18 **Did Mr. Banda Becerra ever do any type of work for you at your home?**
- 103-1 **Were you ever present at any meetings between your husband and Mr. Banda Becerra?**
- 103-7 **Did you know Mr. Banda Becerra was a confidential and Government informant?**
- 103-13 **Do you know Fausto Camacho Rosales?**
- 103-16 **Did you ever see any correspondence from Fausto Camacho to your husband?**
- 103-22 **Did you ever speak to Fausto Camacho Rosales?**
- 104-3 **Did you know Fausto Camacho Rosales was a Government informant?**
- 106-16 **Did you ever see any confidential Government informants at your home on Plymouth Street?**

³ Section 1546(a) provides, in pertinent part, that "[w]hoever knowingly . . . utters, uses . . . possesses, obtains, accepts, or receives any . . . document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made . . . shall be fined under this title or imprisoned."

⁴ Section 371 provides, in pertinent part, "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined and imprisoned." 18 U.S.C. §371 (1994).

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106-23 Were you aware that confidential informants came to your home on Plymouth Street?

In *United States v. Carter*, 6 OCAHO 897 (1996), a witness was asked during a deposition whether he knew certain individuals. It was the theory of the Complainant in that case that the individuals were not work-authorized aliens, and that the witness was their supervisor. In that case, this Court ruled that the witness' Fifth Amendment privilege was properly invoked as the witness reasonably feared criminal prosecution where the Complainant attempted to link the witness to individuals who had or were in violation of various immigration-related laws. *Id.* at 10.

Here, assuming an affirmative answer, the Complainant could impute knowledge of the Respondent's counterfeiting activities to Mrs. Dominguez through her knowledge of acquaintances of the Respondent and her observations of meetings and activities of the above-discussed individuals. Therefore, Complainant's Motion to Compel is DENIED with respect to these questions. However, Complainant may inquire as to whether, subsequent to her husband's arrest, Mrs. Dominguez learned that the named individuals were Government informants.

105-6 Do you know Roberto Garza?

105-11 Did your husband ever use the name Roberto Garza?

105-15 Do you know of any time your husband used an alias?

105-21 Did your husband ever use the name Herminio Guadalupe Munoz-Valaalobos?

106-2 Did your husband ever use the name Gustavo Deleon?

106-8 Did your husband ever use the name Mark Baetrell?

107-4 Have you ever seen your husband wear a disguise, Mrs. Dominguez?

If Mrs. Dominguez confirmed that she knew her husband used an alias, or used or wore a disguise, knowledge of Respondent's counterfeiting activities could then be imputed onto her. Such knowledge

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would constitute a sufficient “link” in the chain of evidence needed to prosecute Mrs. Dominguez, and the witness is therefore justified in objecting to the question. *See Malloy v. Hogan*, 378 U.S. 1, 11 (1964) (discussing “links” in the evidentiary chain leading to criminal prosecution). Therefore, Complainant’s Motion to Compel is DENIED with respect to the above questions.

108–20 **Were your children ever present at your home on Plymouth Street when your husband was counterfeiting documents?**

109–2 **Were your children ever present when your husband received orders for Immigration documents?**

It is well established that a person may not assert a Fifth Amendment privilege as a means of protecting others from criminal liability. The Fifth Amendment privilege against self-incrimination may not be vicariously raised. *See Doe v. U.S.*, 487 U.S. 201, 207 (1988) (noting that the Fifth Amendment privilege against self-incrimination protects a person only against being incriminated by his own compelled testimonial communications). *Accord, Bellis v. United States*, 417 U.S. 85, 89–90 (1974) (noting that Constitutional rights are “purely personal rights” that cannot be vicariously asserted) (internal citations omitted); *United States v. Boruff*, 870 F.2d 316, 319 (5th Cir. 1989) (holding same).

However, here the Fifth Amendment privilege against self-incrimination asserted by Mrs. Dominguez was not on behalf of her children, although the children’s knowledge is the subject of the questions. If Mrs. Dominguez answered these questions in the affirmative, she would be acknowledging that she knew that her husband was counterfeiting documents or was receiving orders for immigration documents because implicit in the above questions is the predicate that Mrs. Dominguez was aware of the Respondent’s counterfeiting activities. Therefore, Complainant’s Motion to Compel is DENIED with respect to the above questions.

109–11 **Did your husband ever tell you that he was proud of his quality in counterfeiting documents?**

109–17 **Did your husband ever refer to himself by the pseudonym of “Chief of Immigration?”**

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- 109-23 **What did your husband do with the income he received from the counterfeiting activities?**
- 110-7 **Did your husband ever give you any of the proceeds from the counterfeiting activities?**
- 110-13 **Is it true your husband used the proceeds from the counterfeiting activities for extra household expenses?**

Any type of affirmative response to the above questions might indicate that the witness knew about the counterfeiting activities. The assumption implicit in all these questions is that she knew that counterfeiting activities were taking place in her home, and that she was aware of the activities. For example, question 110-7 would require the witness to either confirm or deny that she received proceeds from Respondent's counterfeiting activities, despite her previous invocation of the Fifth Amendment when asked if she was *aware* of Respondent's counterfeiting activities. Therefore, Complainant's Motion to Compel is DENIED with respect to these questions.

- 113-7 **Did you play ... the tape on the answering machine from your home at 406 Plymouth the night of his arrest?**
- 116-3 **Did your husband ever tell you to destroy any materials at the house on Plymouth Street?**

The answering machine tape was played during the deposition. It contains statements by the Respondent instructing Mrs. Dominguez to "burn up everything" in a closet. Tr. of Bertha Dominguez at 119. Thus, the Complainant already has significant access to information regarding the answering machine and the events the night Respondent was arrested. It is entirely possible that the witness could give an affirmative answer to the two above questions, which would only confirm to Complainant that the witness was aware of, and possibly an accessory to, the counterfeiting activities of Respondent. Thus, there is ample physical evidence that Complainant's only use for asking the witness the two above questions would be to confirm Mrs. Dominguez's scienter regarding Respondent's activities. Complainant's Motion to Compel is DENIED regarding these two questions.

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IV. Conclusion

Thus, Complainant's Motion to Compel is granted, in part, as to those questions provided above and listed under heading III.A. Complainant's motion requesting sanctions will be addressed in a separate order.

ROBERT L. BARTON, JR.
Administrative Law Judge