

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Willie Israel Navarette, Petitioner

v.

United States of America, Respondent

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

CHAD R. MCCABE
419 Riverwood Dr., Suite 104
Bismarck, ND 58504
(701) 222-2500
N.D.State Bar ID No. 05474
Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether testimony from a suppression hearing may be used for impeachment purposes if a defendant testifies at trial.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

United States v. Willie Israel Navarette, No. 1:18-cr-115, U.S. District Court for the District of North Dakota, Judgment entered January 27, 2020;

United States v. Willie Israel Navarette, No. 20-1285, U.S. Court of Appeals for the Eighth Circuit, Judgment entered May 6, 2021.

TABLE OF CONTENTS

QUESTION PRESENTED	ii
TABLE OF AUTHORITIES	iv
CITATIONS AND OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
1. This Court should resolve the important federal question of whether testimony from a suppression hearing may be used for impeachment purposes if a defendant testifies at trial.	6
CONCLUSION	6

INDEX TO APPENDICES

APPENDIX A	Judgment of the United States District Court
APPENDIX B	Opinion of the United States Court of Appeals for the Eighth Circuit
APPENDIX C	Judgment of the United States Court of Appeals for the Eighth Circuit
APPENDIX D	Order Denying Petition for Rehearing and for Rehearing En Banc
APPENDIX E	Mandate of the United States Court of Appeals for the Eighth Circuit

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE NO.</u>
<i>Simmons v. United States</i> , 390 U.S. 377 (1968).....	3
<i>United States v. Kahan</i> , 415 U.S. 239, 243 (1974).....	4
<i>United States v. Salvucci</i> , 448 U.S. 83 (1980)	4
<u>CIRCUIT CASES:</u>	
<i>United States v. Charles</i> , 738 F.2d 686, 698 (5 th Cir.1984).....	4
<i>United States v. Beltran-Gutierrez</i> , 19 F.3d 1287 (9 th Cir.1994)	4
<i>United States v. Gomez-Diaz</i> , 712 F.2d 949, 951 n. 1 (5 th Cir.1983), <i>cert. denied</i> , 464 U.S. 1051 (1984).....	4
<i>United States v. Jaswal</i> , 47 F.3d 539, 543-44 (2 nd Cir.1995)	4
<i>United States v. Quesada-Rosadal</i> , 685 F.2d 1281 (11 th Cir. 1982).....	4

CITATIONS AND OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on May 6, 2021 and appears as Appendix Exhibit B. This opinion is officially cited as *United States. v. Navarette*, 996 F.3d 870 (8th Cir. 2021).

JURISDICTION

1. Dates of Judgments Sought to be Reviewed.

The Judgment of the United States District Court for the District of North Dakota was filed on January 28, 2020 and appears as Appendix Exhibit A. The Judgment of the United States Court of Appeals for the Eighth Circuit was filed on May 6, 2021 and appears as Appendix Exhibit C.

2. Date of Order Denying Rehearing and Rehearing En Banc.

A timely petition for rehearing en banc and the petition for rehearing by the Eighth Circuit was denied on June 21, 2021 and appears as Appendix Exhibit D. The jurisdiction of this court to review the Judgment of the United States Court of Appeals for the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor

shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Navarette was indicted on one count of possessing a firearm and ammunition after having been convicted of a felony, and the district court held a suppression hearing, where Navarette testified. Navarette's case then proceeded to trial, where he took the stand in his own defense. On cross examination, the prosecutor inquired about a number of statements Navarette made under oath during his suppression hearing that conflicted with his testimony at trial. The prosecutor asked if he remembered his previous testimony that he had purchased the car two days prior to his arrest. He also asked Navarette if he recalled testifying that he inspected the car before purchasing it and that he had been driving for some time and had visited at least two convenience stores before he was pulled over. Navarette responded that he remembered making those statements. His counsel made no objection to the prosecutor's line of questioning. *United States v. Navarette*, Exhibit B

During his closing argument, the prosecutor highlighted Navarette's testimony at trial that the car didn't belong to him and told the jury, "[I]n considering whether you believe that testimony, you can consider ... whether that witness said something different at an earlier time and the general reasonableness of the testimony in light of all the evidence and any other factors that bear on credibility." The prosecutor then listed the ways in which Navarette's testimony at trial contradicted his testimony at the suppression hearing. The jury returned a guilty verdict on the count charged.

United States v. Navarette, Exhibit B

REASONS FOR GRANTING THE PETITION

1. **This Court should resolve the important federal question of whether testimony from a suppression hearing may be used for impeachment purposes if a defendant testifies at trial.**

In *Simmons v. United States*, 390 U.S. 377 (1968), the defendant testified at an evidentiary hearing on his motion to suppress a suitcase containing incriminating evidence which was seized during a police search. *Id.* at 389. The defendant testified that, although he could not identify the suitcase with certainty, it was similar to one he had owned and that he was the owner of clothing found inside the suitcase. *Id.* The defendant's testimony established that he was the owner of the suitcase. *Id.*

The prosecutor introduced a suitcase containing incriminating items recovered from the house of the mother of one co-defendant, and introduced the Defendant's suppression hearing testimony at trial in its case in chief to prove guilt. *Id.* The Court viewed as "intolerable" the dilemma where a defendant is "obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination."

In reversing the conviction, this Court held a defendant cannot be forced to surrender his Fifth Amendment privilege against self-incrimination in return for the opportunity to assert his right to be free from unreasonable search and seizure. *Id.* at 394. This Court ruled that, "[W]hen a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.*

This Court has yet to decide whether testimony from a suppression hearing may be used strictly for impeachment purposes if a defendant testifies at trial. In *United States v. Salvucci*, 448 U.S. 83, 93-94 (1980), this Court acknowledged that *Simmons* had left undecided the propriety of using suppression hearing testimony to impeach a defendant at trial. *Id.*

Although this Court was not presented with an opportunity to resolve the issue in *Salvucci*, this Court commented that “[a] number of courts considering the question have held that such testimony is admissible as evidence of impeachment.” *Id.* at 93 n. 8; *also see United States v. Kahan*, 415 U.S. 239, 243 (1974)(recognizing the Court had not decided whether testimony given at suppression hearing may be used for impeachment purposes but suggesting that protection of *Simmons*, *supra*, is not to be converted into license for false testimony).

Other courts that have examined the issue have determined that a criminal defendant may be impeached with his prior testimony and statements if a defendant testifies to those matters at trial. *United States v. Jaswal*, 47 F.3d 539, 543-44 (2nd Cir.1995); *United States v. Gomez-Diaz*, 712 F.2d 949, 951 n. 1 (5th Cir.1983), *cert. denied*, 464 U.S. 1051 (1984)(under *Simmons*, a defendant at a suppression hearing may testify without fear that the testimony will be used against him at trial except for impeachment); *United States v. Charles*, 738 F.2d 686, 698 (5th Cir.1984)(noting that suppression hearing testimony might be used for purposes of impeachment at trial); *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1289-91 (9th Cir.1994); *United States v. Quesada-Rosalal*, 685 F.2d 1281, 1283 (11th Cir. 1982). Those courts have distinguished *Simmons* as precluding the use of suppression hearing testimony to establish guilt.

As *Simmons* held that a defendant cannot be forced to surrender his Fifth Amendment privilege against self incrimination in return for the opportunity to assert his right to be free from

unreasonable search and seizure, Navarette argues the use of the testimony for impeachment purposes would subject a defendant to precisely the same dilemma, unless he was prepared to relinquish his constitutional right to testify in his own defense, and would thereby create a strong deterrent to asserting Fourth Amendment claims.

One of the purposes of *Simmons* was to remove such obstacles. *Id.* at 392-394. Moreover, the opportunity for cross-examination at the suppression hearing may enable the prosecutor to elicit incriminating information beyond that offered on direct examination to establish the requisite Fourth Amendment interest. Even if such information could not be introduced at the subsequent trial, it might be helpful to the prosecution in developing the case or deciding its trial strategy. The furnishing of such a tactical advantage to the prosecution should not be the price of asserting a Fourth Amendment claim. *Simmons*, therefore, does not eliminate the possibility that a defendant will be deterred from presenting a Fourth Amendment claim because of “the risk that the words which he utters may later be used to incriminate him.” *Id.* at 393.

CONCLUSION

Petitioner, Willie Israel Navarette, respectfully requests this Court grant the petition for a writ of certiorari.

Respectfully submitted on this 20th day of September, 2021.

/s/ Chad R McCabe
CHAD R. MCCABE
419 Riverwood Dr., Suite 104
Bismarck, ND 58504
(701) 222-2500
N.D.State Bar ID No. 05474
Attorney for Petitioner