IN THE
SUPREME COURT OF THE UNITED STATES

KIEFFER MICHAEL SIMMONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Simmons should have been entitled to judicial immunity for his subpoenaed witness, who would have offered exculpatory evidence at trial.

2. Whether an adequate inquiry and record was developed with Simmons' subpoenaed witness on the question of the exercise of his Fifth Amendment rights.

LIST OF PARTIES

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

TABLE OF CONTENTS

OPINION BELOW…….6

JURISDICTION…….6

CONSTITUTIONAL PROVISIONS…….6

STATEMENT OF THE CASE……..6

REASONS FOR GRANTING THE WRIT…….……11

I. THE FIFTH AMENDMENT DEMANDS THAT SIMMONS WAS ENTITLED TO A GRANT OF IMMUNITY TO EDWARDS AND THERE IS A SPLIT BETWEEN CIRCUITS ON WHETHER OR NOT JUDICIAL IMMUNITY IS AVAILABLE……..11

II. THERE IS A SPLIT BETWEEN THE CIRCUITS AS TO WHAT KIND OF RECORD IS ADEQUATE FOR THE DISTRICT COURT IN ORDER TO MAKE A DETERMINATION THAT A WITNESS SUBPEONED BY THE DEFENSE WILL OR WILL NOT EXERCISE HIS 5TH AMENDMENT RIGHT……...19

CONCLUSION…….24

APPENDIX

8th Circuit Opinion filed June 14, 2023
Order Denying Rehearing filed July 21, 2023
District court transcript of trial proceedings (excerpt)

TABLE OF AUTHORITES

Government of the Virgin Islands v Smith, 615 F 2d 964 (3rd Cir. 1980)……....11

Hoffman v. United States, 341 U.S. 479 (1951)…….....22

Simmons v United States, 390 US 377 (1968)……...11

United States v. Ahmed, 73 F.4th 1363 (11th Cir. 2023)……22

United States v. Apperson, 441 D 3d 1162 (10th Cir.2006)……..12

United States v. Appiah, 690 Fed. Appx. 807 (2017)…….22

United States v. Baca, 447 F.Supp.3d 1149 (D.C. New Mexico 2020)…….12, 13

United States v Bowling, 239 F 3d 973 (8th Cir. 2001)……...……22

United States v Bryser, 95 F 3d 182 (2nd Cir. 1996)……..12

United States v. Capozzi, 883 F.2d 608 (8th Cir. 1989)……..14, 16, 17

United States v. Castorena-Jaime, 285 F.3d at 916 (10th Cir. 2002)…….……21

United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987)……..22

United States v. Doto, 205 F.2d 416 (2d Cir. 1953)……..……..22

United States v Garner, 631 F 2d 834 (9th Cir. 1981)…...……..11

United States v. Godwin, 625 F.2d 693 (5th Cir. 1980)…...……21

United States v. Gomez-Rojas, 507 F.2d 1213 (5th Cir, 1975)……..…….21

United States v. Klinger, 128 F.3d 705 (9th Cir. 1997)……..…21

United States v Lowell, 490 F. Supp. 897 (D.C. New Jersey 1980)……...…11

United States v. Melchor-Moreno, 562 F.2d 1042 (5th Cir. 1976)……..…..21, 22

Unites States v. Miller, 954 F.3d 551 (2d Cir. 2020)……..…..22

United States v. Moalin, 973 F.3d 977 (9th Cir. 2020)…….12, 13

United States v. Moussaouie, 382 F.3d 453 (4th Cir. 2003)…….…..12

United States v Nelson, 529 F 2d 40 (8th Cir. 1976)…….20, 22

United States v Nolan, 523 F. Supp. 1235 (W.D. Penn. 1981)……..…….11

United States v Quinn, 728 F 3d 24 (3rd Cir. 2013)…….…..11

United States v. Victor, 973 F.2d 975 (1st Cir. 1992)..……22

United States v. Waddell, 507 F.2d 1226 (5th Cir. 1975)……..….21

United States v. Warfield, 97 F.3d 1014 (8th Cir. 1996)……..……19, 22

United States v Washington, 318 F 3d 845 (8th Cir. 2003)…….……..20, 22

United States v. Washington, 887 F.Sup.2d 1097 (D.C. Montana 2012)……....12

5th Amendment of the United States Constitution……..6, 13, 18, 19, 21, 22, 23

6th Amendment of the United States Constitution……..….6, 18

OPINIONS BELOW

Kieffer Michael Simmons respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in Case No. 22-1686 entered on June 14, 2023, made final with the denial of rehearing on July 21, 2023. The opinion of the Eighth Circuit Court of Appeals appears in the Appendix to the Petition. The appeal stems from Simmons' conviction and sentence of 115 months entered by the Honorable Rebecca Goodgame-Ebinger on March 24, 2020, as amended on April 14, 2022. *United States v. Simmons, Case No. 4:20-cr-00189.*

JURISDICTION

The United States Court of Appeals for the 8th Circuit entered judgment on June 14, 2023. A petition for rehearing was denied on July 21, 2023.

The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

CONSTITUITIONAL PROVISIONS

Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Simmons does not dispute the procedural history cited by the Eighth Circuit on page 2 of its June 14, 2023 opinion, Simmons believes that additional facts and the procedural history should be presented here. [1]

[1] In this Brief, the following abbreviations will be used:

The indictment was obtained as the result of an ATF investigation commencing in January of 2020. A confidential source (hereinafter "Wauters") advised LEO that he could purchase drugs and firearms from co-defendant Edwards. Between January and October of 2020, Wauters made controlled purchases of drugs and firearms from Edwards and others that Edwards had introduced to him. (PSR p. 5). Wauters also stated that Edwards had numerous sources from which he could buy firearms. (PSR p. 6).

On January 21, 2020, Wauters bought a .38 caliber revolver from Edwards for $400. After that completed transaction Edwards called Simmons in order to meet for the purpose of selling firearms to Wauters. Wauters and Edwards arrived first. Simmons arrived driving his Jeep Grand Cherokee with a male passenger. Both Simmons and the male passenger got out of the car with the male passenger carrying a rifle case. Wauters purchased a rifle from either the male passenger or Simmons for $800. (PSR p. 8). There was no dispute that on January 21, 2020,

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"R. Doc" — district court clerk's record, followed by docket entry and page number, where noted;
"Pretrial Tr. ." — Pretrial transcript, followed by page number
"Trial Tr." — Trial transcript, followed by page number and;
"PSR" --- Presentence investigation report, followed by page number.

Simmons possessed a valid permit to possess and carry weapons issued by the Polk County Sheriff's Office. (Def. Ex. AA).

On February 26, 2020, Wauters contacted Edwards by text in order to purchase methamphetamine. Edwards texted him a photo and short video of what Wauters took to be methamphetamine with the caption "There u go". The next day Edwards texted Wauters that he was at Simmons's house at 2524 E Walnut St., in Des Moines, Iowa. Wauters texted Edwards asking if Simmons had any guns for sale and Edwards responded that he did. (PSR p. 10). On February 28, 2020, Wauters picked up Edwards and drove to Simmons's house on E Walnut. Once there Edwards and Wauters met Simmons behind the house near a detached garage. Wauters was wearing a recording device and law enforcement was also conducting surveillance of Simmons's house. Law enforcement was unable to capture any video depicting the interactions between Wauters, Edwards, and Simmons. The audio tape of the encounter this day was incomplete, to say the least. The government propounded that the audio revealed that Simmons made several comments during a conversation between Wauters, Edwards, and Simmons that were consistent the sale of methamphetamine. (R. Doc. 356). Wauters testified that he purchased about 2.5 ounces of methamphetamine from Simmons for $900. (Trial Tr. p. 306).

Prior to trial, Simmons procured a writ of ad testificandum for the testimony of co-defendant Edwards at trial. (R. Doc. 333). On October 24, 2021, the government filed a Motion in Limine seeking to preclude the testimony of Edwards and to prohibit the counsel from referencing a prior written and notarized statement about Simmons's involvement in the distribution of controlled substances. (R. Doc. 356). In its Motion in Limine the government asserted that in conversations with Edwards counsel it believes that Edwards intended to assert his 5th Amendment right against self-incrimination but conceded that if Edwards intended to testify consistent with his notarized statement, that Simmons would be permitted to call Edwards at trial subject to cross-examination by the government. (R. Doc. 356).

In response to government's Motion in Limine the undersigned related his conversations with Edwards's counsel, Nick Sarcone, who informed the undersigned that while he had advised Edwards to assert his 5th Amendment right because he had yet to be sentenced, he was not entirely positive that Edwards would heed that advice. Simmons's resistance was filed two weeks prior to trial and at that time it was unknown whether Edwards would or would not assert his 5th Amendment right against self-incrimination. (R. Doc. 379).

The court held a final pretrial conference on Friday. November 12, 2021, to take up among other matters the issue of Edwards's subpoena and the

government's Motion in Limine. (Pretrial Tr. p. 4). At the conclusion of the hearing the court concluded that it was without authority to offer judicial immunity to Edwards and would enter a ruling on what further record was necessary at trial on the issue of Edwards's assertion of his 5th Amendment right against self-incrimination. (Pretrial Tr. p. 4-19). Later that day, the court entered a written order and noted that the government would not grant immunity to Edwards and that the court was declining the invitation to grant judicial immunity. The court further noted that in the event further record is needed regarding Edwards invocation of his 5th Amendment rights, the court will admit such a record at the time of trial. Further, the court noted that to the extent Simmons intended to offer Edwards's notarized statement as evidence, the court reserved ruling on the admissibility of that evidence until the issue of Edwards's invocation of his 5th Amendment right was addressed at trial. (R. Doc 394).

On November 15, 2021, the first day of trial, prior to jury selection, the court found that based upon Edwards's counsel's statements that Edwards intended to assert his 5th Amendment right against self-incrimination, and determined that no further record would be required at trial and notified the Marshal that the transportation of Edwards for trial on Tuesday, November 16, 2021, would not be required. (Trial Tr. p. 4-8).

Next, the court took up the matter of Simmons's proposed Exhibit AA, Edwards's notarized statement. The court ruled the admission of proposed defense Exhibit AA be denied. (Trial Tr. p. 8-11).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH AMENDMENT DEMANDS THAT SIMMONS WAS ENTITLED TO A GRANT OF IMMUNITY TO EDWARDS AND THERE IS A SPLIT BETWEEN CIRCUITS ON WHETHER OR NOT JUDICIAL IMMUNITY IS AVAILABLE.

The concept of judicial immunity was pioneered in *Simmons v United States v. 390 US 377 (1968)*. Subsequently, in *Government of the Virgin Islands v Smith, 615 F 2d 964 (3rd Cir. 1980)* the grant of judicial immunity is conditioned upon a showing by the defendant that the government's decision not to provide immunity was a decision made "with deliberate intention of distorting the judicial fact-finding process". *Smith at 968*. Additionally, *Smith* establishes a criteria for judicially conferred immunity to include:

> "...(I)mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong government interest which countervails against a grant of immunity..." *Id at 972. See also United States v Lowell, 490 F. Supp. 897 (D.C. New Jersey 1980); United States v Nolan, 523 F. Supp. 1235 (W.D. Penn. 1981); United States v Garner, 631 F 2d 834 (9th Cir. 1981).* [2]

[2] Smith was overruled by the Third Circuit in *United States v. Quinn, 728, F.3d 24 (3d Cir. 2013)*.

A couple of additional circuits have recognized the concept of judicial immunity, including *United States v. Moussaouie, 382 F.3d 453 (4th Cir. 2003); Moalin, 973 F.3d 977 (9th Cir. 2020)*; and the Second Circuit in *United States v. Bryser, 95 F.3d 182 (2d Cir. 1996)*, as well as the district court of Montana in *United States v. Washington, 887 F.Supp.2d 1097 (D.C. Montana 2012).* While the Fourth, Ninth and Second Circuits have applied the concept of judicial immunity approvingly, other circuits, including the Eighth Circuit have refused to exercise or authorize the concept of judicial immunity. *United States v. Baca, 447 F.Supp.3d 1149 (D.C. New Mexico 2020)*, recognized the splits between the circuits in opining the Tenth Circuit would and should adopt the majority approach of the Tenth Circuit versus the Ninth and Third Circuits approach to a defense witness immunity approach. In *Baca*, the district court recognized that the majority of the Court of Appeals have adopted a standard to determine whether the United States' selective use of immunity violates the due process rights of the defendant that requires a showing that "["i" t]he witnesses' testimony is material, exculpatory, non-cumulative, and not obtainable from any other source; and [(ii t]he government's decision to deny immunity was made with the "deliberate intention of distorting the fact-finding progress")] *citing*, *United States v. Apperson, 441 F.3d 1162 (10th Cir. 2006)*.

The district court in *Baca* also noted that although Congress was given the United States immunity power, courts must check that power to ensure it is being properly applied. In *United States v. Moalin, 973 F.3d 977 (9th Cir. 2020)* it was determined that the due process clause of the Fifth Amendment requires that under certain circumstances, a court compel the prosecution to grant a witness use immunity which guarantees the witnesses that their testimony will not be used against them in a criminal case, except that it does not protect against the prosecution for perjury. The Ninth Circuit went on to state that due process requires a court to grant use immunity to a defense witness only when the defense establishes that the testimony will be relevant and that "(1) the prosecution intentionally caused a defense witness to invoke the Fifth Amendment right against self-incrimination with the purpose of distorting the fact-finding process; or (2) granted immunity to a government witness in order to obtain that witness' testimony but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness, with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial.

These are exactly the circumstances which occurred here. A review of the docket filings shows that Edwards entered into his plea agreement with the government on June 7, 2021. (R. Doc. 228). Edwards's original sentencing date

was set for October 21, 2021, but on July 14, 2021 the government moved to continue Edwards's sentencing and over objection of Edwards, sentencing was reset for December 2, 2021. (R. Doc. 274, 275). Simmons asserted that the government moved to continue Edwards's sentencing solely to discourage him from offering testimony it knew he was willing to provide on behalf of Simmons at Simmons's trial. If Edwards had been sentenced as originally scheduled, the government would have been precluded from arguing at his sentencing that by testifying at Simmons's trial that he was failing to accept responsibility and/or that he obstructed justice, exposing him to a potentially longer advisory guideline sentence. Simmons asserted under *Smith* that in moving to continue Edwards's sentencing and to hold over his head the threat of asserting at his sentencing that he does not qualify for a 3-level acceptance of responsibility and qualifies for a 2-point addition for obstruction of justice by testifying consistently with his prior notarized statement regarding Simmons, that conduct qualifies as the requisite deliberate intention of distorting the judicial fact finding process. *Id at 968*.

The 8th Circuit recognized the concept of judicial immunity in *United States v. Capozzi, 883 F.2d 608 (8th Cir. 1989).* There, Capozzi was charged with conspiracy to defraud a bank, 7 counts of wire fraud, 5 counts of mail fraud, and 2 counts of unlawfully receiving bank funds from insider transactions. Four days before trial, the government filed a bill of particulars naming 5 unindicted co-

conspirators. Three of those five individuals were Capozzi associates, including one of Capozzi's lawyers. During trial and after the government concluded its case, Capozzi called the three recently named unindicted co-conspirators to the witness stand out of the presence of the jury. Each person asserted that, if called, he would invoke his 5th Amendment privilege and declined to testify. The district court determined that each of the individuals had asserted his right to remain silent and, therefore, concluded it would be improper for the court to call these witnesses before the jury and compel them to claim their constitutional privilege. Accordingly, the potential defense witnesses were excused from testifying. Capozzi's trial counsel advised the district court that the anticipated testimony of the three individuals was crucial to his defense. The government declined to apply for use immunity pursuant to *18 USC Section 6001, et seq*., and the district court took the position it had no authority to compel the government to offer statutory immunity. Capozzi then requested that the district court (a) continue the matter, (b) dismiss the indictment with prejudice, or (c) judicially immunize the witnesses and compel their testimony. The district court declined Capozzi's invitation, instead, granting him leave to present to the jury relevant portions of earlier sworn deposition testimony offered by all three men during civil proceedings before attorneys for the Federal Home Loan Bank Board and FSLIC in connection with Capozzi's actions.

On appeal, the 8th Circuit recognized that some circuits have suggested or held that if the government grants use immunity to its witnesses but refuses to offer immunity to potential defense witnesses, with the deliberate intention of distorting judicial fact-finding process, a defendant's rights to due process may have been violated. *Capozzi at 613.* The 8th Circuit recognized the 3rd Circuit's position that a court has inherent power to immunize witnesses whose exculpatory testimony is essential to an effective defense. The *Capozzi* court declined to follow *Smith* stating that neither the Supreme Court nor this Court have ruled on whether a court has inherent authority to grant use immunity and this Court has previously indicated a doubt that such power lies in the judiciary. *Id at 613.* Accordingly, the *Capozzi* court declined to follow *Smith* and reasserted its doubt that the court has the power to order such a grant of judicial immunity. *Id at 614*. The 8th Circuit went on to state however that assuming the district court has authority to immunize defense witnesses, that it is clear that such an order would be an extraordinary remedy to be used sparingly and only when the proffered evidence was clearly exculpatory. Analyzing Capozzi's claims versus that standard the 8th Circuit found that his case did not warrant such an extraordinary relief because the government's acts, in his case, were not of such a quality that prevented a fair trial and that there was no absence of fairness. *Id at 614.* The 8th Circuit also noted that Capozzi was allowed by the district court to present as evidence relevant portions of earlier

sworn depositions of testimony given by the defense witnesses and that on appeal Capozzi failed to delineate any suggested testimony over and above that which was presented to the jury from said depositions.

This case was unlike *Capozzi* in that Edwards has not previously presented any sworn deposition testimony which could be presented to the jury. Additionally, Edwards's testimony is not cumulative or otherwise superfluous to any other available testimony to Simmons through the use of another witness. Edwards's anticipated testimony is clearly exculpatory in this case in that Edwards states that Simmons sold no methamphetamine to CS#1 (Wauters) on February 28, 2020, and that no sale of methamphetamine at Simmons's residence occurred on that date. Edwards would also offer testimony that Simmons possessed a small amount of methamphetamine which he and Simmons consumed on that date. This testimony is essential to Simmons because without it he has no other testimony, save his own, to offer from any of the individuals present in his garage on February 28, 2020. Edwards's expected testimony would also be exculpatory to the government's claims that Simmons participated in the conspiracy with Edwards and others to distribute methamphetamine. Edwards would offer testimony that Simmons was not a seller of methamphetamine but merely a methamphetamine user.

The Supreme court should adopt the rationale employed by the Second, Third, Fourth and Ninth Circuit versus the Eighth, Tenth and other Circuits in determining that the court should either require the government to immunize a defense witness or offer Court immunity to a defense witness when:

(1) The prosecution intentionally causes a defense witness to invoke the Fifth Amendment right against self-incrimination with the purpose of distorting the fact-finding process or

(2) Granted immunity to a government witness in order to obtain that witness' testimony but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial under the Fifth Amendment.

By precluding Simmons from calling Edwards as a witness through its failure to order the government to immunize Edwards or grant him judicial immunity, both the district court and the Court of Appeals violated Simmons' right to compulsory process under the *Sixth Amendment of the United States Constitution* and his right to due process and a fair trial under the *Fifth Amendment of the United States Constitution.*

Certiorari must be granted to resolve the split between the circuits on judicial immunity.

II. THERE IS A SPLIT BETWEEN THE CIRCUITS AS TO WHAT KIND OF RECORD IS ADEQUATE FOR THE DISTRICT COURT IN ORDER TO MAKE A DETERMINATION THAT A WITNESS SUBPEONED BY THE DEFENSE WILL OR WILL NOT EXERCISE HIS 5TH AMENDMENT RIGHT.

The Eighth Circuit dismissed Simmons' assertion that the district court failed to conduct an adequate inquiry with Edwards as the exercise of his Fifth Amendment right in a footnote on page 3 of its opinion. The Eighth Circuit stated in most cases a counsel's statement that "the witness would exercise his Fifth Amendment rights if called to testify is sufficient for the district court to refuse to compel that witness to appear." *United States v. Warfield, 97 F.3d 1014 (8th Cir. 1996*). The Eighth Circuits reliance on *Warfield* is misplaced because in *Warfield* the district court held a hearing on the issue of Warfield's request for a writ of habeas corpus ad testificandum compelling one Terrance Davis to appear at trial to testify. At the time Warfield made his request, Davis was incarcerated in UPC at Leavenworth, Kansas, having been tried and convicted for his participation in the same back robbery for which Warfield was being tried. Additionally, Davis's direct appeal was pending before the 8th Circuit. The district court held a hearing on the issue of Warfield's request for the writ with Davis' attorney present. Davis's attorney stated to the court in no uncertain terms that if the court required Davis to appear and take the stand, Davis would unequivocally exercise his 5th Amendment right against self-incrimination. In light of his lawyer's representation, the district court overruled

Warfield's request that Davis be compelled to appear and take the stand. On appeal, the 8th Circuit found that in that case, Davis's attorney's representation that he would exercise his 5th Amendment privilege against self-incrimination, coupled with the fact that his direct appeal was still pending, presented a sufficient basis for the district court to conclude that was precisely what Davis would have done.

The Eighth Circuit in *United States v Washington, 318 F 3d 845 (8th Cir. 2003)* referred to *United States v Nelson, 529 F 2d 40 (8th Cir. 1976)*, in noting that the district court should, outside the presence of the jury, conduct an inquiry into whether the witness's responses to the proposed line of questioning would subject the witness to possible criminal prosecution. The *Nelson* court went on to state that the court is required to look at whether the hazards of incrimination are "substantial and real, not merely trifling or imaginary". *Nelson at 44*. The *Nelson* court went on to state that the trial judge should order the *witness* to answer questions "only if it is "perfectly clear, careful consideration of all the circumstances in the case and that the answer cannot possibly be" tend to incriminate the witness". *Nelson at 44*.

It is important to note that in all of its references to the procedures employed by the district court, both the *Washington* and *Nelson* courts referred to the *witness* as to who to make the inquiry with, not the witness's *lawyer*.

Circuits are split on the question of what sort of record the district court is

required to make with the witness before determining that witness has effectively exercised his right to remain silent under the Fifth Amendment.

The Fifth Circuit, in *United States v. Waddell, 507 F.2d 1226 (5th Cir. 1975)* and *United States v. Gomez-Rojas, 507 F.2d 1213 (5th Cir. 1975)* and *United States v. Melchor-Moreno, 562 F.2d 1042 (5th Cir. 1976*) as well as the Ninth and Tenth Circuits in *United States v. Klinger, 128 F.3d 705 (9th Cir. 1997)* and *United States v. Castorena-Jaime, 285 F.3d at 916 (10th Cir. 2002),* ascribe to the position that the court must conduct an in-camera hearing into a witness' assertion of his Fifth Amendment privilege such that the court must make a particularized inquiry and must decide, in connection with each specific area that the questioning party wishes to explore, whether the claim of privilege is well-founded. See, *United States v. Godwin, 625 F.2d 693 (5th Cir. 1980).*

In *Godwin*, the court took the position that in order for the trial judge to make a proper inquiry into the legitimacy and scope of the witness' assertion of his Fifth Amendment privilege, the court must hold a hearing to determine whether the witness' fear of self-incrimination was justified and, if so, what the boundaries of the witness' Fifth Amendment rights were in relation to the testimony sought by the defendant. *See also*, *United States v. Gomez-Rojas, 507 F2d 1213, 1220 (5th Cir. 1975)*. The *Godwin* court went on to state that the when the trial court conducts an in-camera hearing into the witness' Fifth Amendment privilege, it

must make "a particularized inquiry, deciding in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded." *United States v. Melchor-Moreno, 536 F.2d 1042, 1049 (5th Cir. 1976).*

Contrast to the position of the Fifth and Ninth circuits are the positions taken by the Second Circuit in *United States v. Doto, 205 F.2d 416 (2nd Cir. 1953); Unites States v. Miller, 954 F.3d 551 (2nd Cir. 2020)*, the Eighth Circuit in this case, *United States v. Bowling, 239 F.3d 973 (8th Cir. 2001), United States v. Washington, 318 F.3d 845 (8th Cir. 2003)* and *United States v. Warfield, 97 F.3d 1014 (8th Cir. 1996).* [3]

The 5th Circuit in *United States v. Victor, 973 F.2d 975 (1st Cir. 1992),* the 4th Circuit in *United States v. Appiah, 690 Fed. Appx. 807 (2017)*, and the 11th Circuit in *United States v. Ahmed, 73 F.4th 1363 (11th Cir. 2023)* where those circuits have stated that it is not necessary to require an in-camera hearing to determine if a witness' invocation of his Fifth Amendment privilege to self-incrimination has a basis in fact.

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[3] Note, however, in *United States v. Nelson, 529 F.2d 40 (8th Cir. 1976),* the Eighth Circuit states that the district court should, outside the presence of the jury, conduct an inquiry into whether the witness' responses to the proposed line of questioning subject the witness to possible criminal prosecution. The *Nelson* court stated that the trial judge should order the witness to answer questions "only if it is perfectly clear, consideration of all circumstances in the case, that the answer cannot possibly" tend to incriminate the witness. *United States v. Chalan, 812 F.2d 1302, 1310 (10th Cir. 1987) and Hoffman v. United States, 341 U.S. 479, 488 (1951).*

Here, the district court's reliance upon the professional statement of Edwards' attorney was not of sufficient inquiry into whether his responses to any proposed line of questioning would subject him to possible further criminal prosecution. The professional statement of Edwards' lawyer was insufficient. It was done in advance of trial without Edwards even being present. Nothing can replace an actual hearing with the witness where the witness is propounded with questions by counsel for the defendant in order to satisfy his Sixth Amendment right of confrontation and the court to determine if answers to those questions would result in truly incriminating answers to be given by the witness. This is the only way that we can determine whether or not a witness' claim of self-incrimination is valid. Merely relying upon a statement of counsel is inadequate.

It is clear under any standard, whether it be in-camera hearing or reliance upon statements of counsel, the inquiry performed by the district court in this case was clearly inadequate.

The difference of what record should be conducted on the issue of whether a witness is entitled to claim a Fifth Amendment privilege or not remains split between the circuits. This court must answer the question once and for all.

Certiorari must be granted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/

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