# IN THE
# SUPREME COURT OF THE UNITED STATES

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## KIEFFER MICHAEL SIMMONS,

Petitioner,

v.

## UNITED STATES OF AMERICA,

Respondent.

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

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# APPENDIX

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ATTORNEY FOR PETITIONER

# United States Court of Appeals
## For the Eighth Circuit

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No. 22-1686

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United States of America

*Plaintiff - Appellee*

v.

Kieffer Michael Simmons

*Defendant - Appellant*

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No. 22-2179

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United States of America

*Plaintiff - Appellee*

v.

Terry Eugene Hambrick

*Defendant - Appellant*

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Appeal from United States District Court
for the Southern District of Iowa - Central

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Submitted: January 11, 2023
Filed: June 14, 2023

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Before GRASZ, MELLOY, and KOBES, Circuit Judges.

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KOBES, Circuit Judge.

A jury convicted co-defendants Kieffer Simmons and Terry Hambrick of conspiracy to distribute and distribution of methamphetamine, 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846. Both challenge several district court[1] rulings, and Hambrick appeals his conviction. We affirm.

I.

In January 2020, the Government began using a confidential informant (CI) for controlled buys of guns and drugs in Des Moines, Iowa. The controlled buys resulted in multiple arrests. Most of the co-defendants pleaded guilty but Simmons and Hambrick went to trial.

II.

We first turn to Simmons. Co-defendant Leon Edwards introduced the CI to Simmons. In February 2020, Edwards and the CI met with Simmons, and Simmons sold the CI methamphetamine. Simmons sought to call Edwards at trial, who would testify that Simmons did not sell methamphetamine to the CI. Edwards also wrote a letter stating the same. The Government moved to exclude Edwards's testimony and letter. At the final pretrial conference, Edwards's attorney indicated that Edwards did not want to testify, and if called, he would invoke his Fifth Amendment right against self-incrimination. To secure Edwards's testimony, Simmons asked the court to order the Government to grant Edwards immunity or, alternatively, immunize Edwards itself. The court declined to do either and refused to admit Edwards's letter in lieu of his testimony because it was inadmissible hearsay.

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[1]The Honorable Rebecca L. Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

Additionally, before trial, Simmons proposed a jury instruction on multiple conspiracies. The district court found that the evidence did not support multiple conspiracies, so it did not give the instruction.

Simmons argues that (1) Edwards's testimony and written statement should have been admitted and (2) the district court should have instructed the jury on multiple conspiracies instead of a single conspiracy. We review the district court's rulings for an abuse of discretion. *See United States v. Blaylock*, 421 F.3d 758, 770 (8th Cir. 2005) (declining to compel witness testimony); *United States v. Cree*, 778 F.2d 474, 477 (8th Cir. 1985) (refusing to admit hearsay evidence); *United States v. Ivers*, 967 F.3d 709, 720 (8th Cir. 2020) (rejecting a proposed jury instruction).

A.

Simmons argues that, in exchange for Edwards's testimony, the court should have ordered the Government to give Edwards immunity or immunized Edwards itself. But district courts "lack[] authority to compel the Government to request immunity for [a defense witness]." *United States v. Bowling*, 239 F.3d 973, 976 (8th Cir. 2001) (cleaned up). "Additionally, the district court did not have the authority to grant [Edwards] immunity because this court has consistently refused to recognize the concept of judicial immunity." *Id.* (cleaned up). Simmons's other arguments regarding Edwards's testimony are equally unavailing.[2] All considered, the district court did not abuse its discretion.

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[2]Simmons argues that his Sixth Amendment rights were violated when the court did not compel Edwards to testify. But Simmons's "Sixth Amendment right to compulsory process does not include the right to compel [a witness] . . . to waive his or her Fifth Amendment privilege against self-incrimination." *United States v. Ralston*, 973 F.3d 896, 912 (8th Cir. 2020) (citation omitted). Simmons also argues that the district court should not have relied on Edwards's counsel's statement at the pretrial conference, and instead should have required Edwards to personally assert his Fifth Amendment right at trial. But in most cases, a counsel's statement that "the witness would exercise his Fifth Amendment rights if called to testify is sufficient

Simmons also argues that, in lieu of Edwards's testimony, the court should have admitted Edwards's letter under the residual hearsay exception. *See* Fed. R. Evid. 807(a). The residual exception is to "be used very rarely, and only in exceptional circumstances." *United States v. Peneaux*, 432 F.3d 882, 893 (8th Cir. 2005) (citation omitted). To fall within the exception, the statement must be "supported by sufficient guarantees of trustworthiness." Fed. R. Evid. 807(a)(1). The district court concluded that the letter was not trustworthy. Although the court did not explain how it reached its conclusion, the court's "discretion in determining the admissibility of evidence is particularly broad in a conspiracy trial." *United States v. King*, 898 F.3d 797, 805 (8th Cir. 2018) (cleaned up). And it's not hard to imagine why the letter was not sufficiently trustworthy—the letter was not written under oath and contradicted the CI's sworn testimony. Given the district court's considerable discretion, and our deference to the district judge "who saw and heard the evidence," *United States v. Burch*, 809 F.3d 1041, 1045 (8th Cir. 2016) (citation omitted), the court did not abuse its discretion by excluding the letter.

B.

Next, Simmons argues that the court should have instructed the jury on multiple conspiracies instead of a single conspiracy. He proposed that the jury must "find that he was a member of the conspiracy charged in the indictment [and] not a member of some other separate conspiracy" to find him guilty. Simmons Br. 31. He argues that he was part of a separate conspiracy because he did not know any of the co-defendants except Edwards, all co-defendants had separate contact with Edwards and the CI, and the controlled buys occurred in different places.

District courts look to many factors when determining whether a multiple conspiracy instruction is warranted, like "the nature of the activities involved, the location where the alleged events of the conspiracy took place, the identity of the

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for the district court to refuse to compel that witness to appear." *United States v. Warfield*, 97 F.3d 1014, 1019–20 (8th Cir. 1996).

conspirators involved, and the time frame in which the acts occurred." *United States v. Radtke*, 415 F.3d 826, 838–39 (8th Cir. 2005) (citation omitted). "A single conspiracy may be found when the defendants share a common overall goal and the same method is used to achieve that goal, even if the actors are not always the same." *United States v. Gilbert*, 721 F.3d 1000, 1005 (8th Cir. 2013) (citation omitted).

Edwards introduced the CI to several people, including Simmons and later Hambrick (through a middleman). The drug deals involving the co-defendants were similar in that they started with Edwards and occurred in Des Moines during the same time frame. The fact that Simmons did not know his co-defendants did not warrant a multiple conspiracies instruction. *See United States v. Campbell*, 986 F.3d 782, 797 (8th Cir. 2021) (holding that a multiple conspiracies instruction was not warranted where there was no evidence of a separate conspiracy), *cert. denied*, 142 S. Ct. 751 (2022). The district court did not abuse its discretion in refusing to instruct the jury on multiple conspiracies.

III.

We now turn to Hambrick's case. Edwards introduced the CI to co-defendant Leroy Williams, a middleman. In April 2020, the CI and Williams were sitting in Williams's car. Williams then left the car and got into a white SUV. When Williams returned, he sold the CI a plastic bag of methamphetamine. After the deal, agents confirmed that Hambrick was the driver of the SUV. Fingerprints belonging to Hambrick, Williams, and the CI were found on the bag.

At trial, two witnesses, K.T. and D.S., testified that Hambrick was a drug dealer. K.T. testified that Hambrick sold him methamphetamine near where the April 2020 buy took place in the same white SUV. D.S. testified that Hambrick sold him PCP in Hambrick's truck. Hambrick was convicted. He moved for a new trial, arguing that the district court erred in allowing K.T.'s and D.S.'s testimony. The district court denied the motion.

Hambrick argues that there was insufficient evidence to convict him. We review the sufficiency of the evidence *de novo* in the light most favorable to the verdict. *United States v. Chahia*, 544 F.3d 890, 893 (8th Cir. 2008). Hambrick also challenges the admissibility of K.T.'s and D.S.'s testimony. Because Hambrick did not object to their testimony at trial, we review for plain error. *See United States v. Maxwell*, 643 F.3d 1096, 1099–1100 (8th Cir. 2011).

A.

We first consider Hambrick's challenge to the sufficiency of the evidence. "The standard for reviewing a claim of insufficient evidence is strict, and a jury's guilty verdict should not be overturned lightly." *United States v. Tate*, 633 F.3d 624, 628 (8th Cir. 2011) (citation omitted). Hambrick argues that the CI did not identify, know, or ever meet with Hambrick, and therefore Hambrick could not have been part of the conspiracy. But the CI's knowledge of Hambrick or Hambrick's role is not necessary for a conspiracy conviction. *See United States v. Johnson*, 719 F.3d 660, 666 (8th Cir. 2013) (noting that "a conspirator need not know all of the conspirators or be aware of all the details of the conspiracy, so long as the evidence is sufficient to show knowing contribution to the furtherance of the conspiracy" (cleaned up)).

The evidence established that Williams bought methamphetamine from Hambrick and sold it to the CI. The CI testified to arranging the buy and Williams's phone records showed calls with Hambrick on the day of the buy. After Williams bought methamphetamine from someone in the white SUV, officers identified Hambrick as the driver. The plastic bag that Williams later sold the CI had fingerprints from all three men. Additionally, the jury heard testimony from K.T. and D.S. that Hambrick sold drugs in the same car and in the same location as the controlled buy. This evidence was sufficient to sustain his conspiracy conviction.

B.

Hambrick argues that it was plain error to admit K.T.'s and D.S.'s testimony. To survive plain error review, Hambrick must show (1) an error, (2) the error was plain, and (3) that it affected a substantial right. *United States v. Jawher*, 950 F.3d 576, 579 (8th Cir. 2020).

Hambrick argues that the testimony was impermissible prior bad act evidence. *See* Fed. R. Evid. 404(b)(1). Alternatively, he argues that it was unfairly prejudicial. *See* Fed. R. Evid. 403. The Government argues that the testimony was properly admitted as intrinsic evidence. *See United States v. Young*, 753 F.3d 757, 770 (8th Cir. 2014).

We do not need to resolve the purpose for which K.T.'s and D.S.'s testimony was offered because Hambrick's challenge does not survive the third prong of plain error review. An error affects a substantial right if there is "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (citation omitted). The testimony of the agent and the CI, Williams's phone records, the fingerprints on the bag of methamphetamine, and the supporting exhibits all support the jury verdict without the testimony of K.T. and D.S.

IV.

For the reasons stated above, we affirm the district court's rulings and Hambrick's conviction.

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# UNITED STATES COURT OF APPEALS
# FOR THE EIGHTH CIRCUIT

No: 22-1686

United States of America

Appellee

v.

Kieffer Michael Simmons

Appellant

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Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:20-cr-00189-RGE-5)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 21, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Mr. Hambrick received or had those offers communicated to him and that he rejected those offers.

THE COURT: And at this point, is it Mr. Hambrick's desire to proceed to trial in this matter?

MR. DYER: That's my understanding, Judge.

THE COURT: Thank you.

Mr. Bertogli, does the Government's recitation of the record in regards to your plea negotiations comport with your recollection?

MR. BERTOGLI: It does, Your Honor. And both under the representation provided by Mr. Payton previously and myself, Mr. Simmons has rejected the Government's plea offer and wishes to proceed to trial.

THE COURT: Thank you.

So, with that record, we are going to turn to the issue of Mr. Edwards' testimony.

Mr. Bertogli, you have set forth in your written materials that you believe that the Court should allow Mr. Edwards to testify and that I should, if the Government attempts to -- or declines to give immunity, that the Court should offer judicial immunity to Mr. Edwards to compel his testimony.

Is that my correct understanding of your position?

MR. BERTOGLI: It is, Your Honor.

THE COURT: Thank you.

Before we proceed with argument as to what the Court should do, I would like to hear from Mr. Sarcone. There have been various representations made to the Court as to what Mr. Edwards' intentions are at this point.

Mr. Sarcone, are you aware of Mr. Edwards' intentions as to trial in this matter? I understand he's been served with a subpoena; is that accurate?

MR. SARCONE: That is correct, Your Honor.

THE COURT: And what is your understanding of Mr. Edwards' intent?

MR. SARCONE: My understanding is at this point, given the potential for the Government to bring an additional charge and/or to seek enhancements to his sentence at sentencing, Mr. Edwards is going to assert his Fifth Amendment right to not testify.

THE COURT: So if called upon to come to court, he would assert his Fifth Amendment right not to testify and would decline to answer questions put to him by counsel?

MR. SARCONE: That is correct, Your Honor.

THE COURT: Thank you.

Would the Government like to be heard as to, one, any actions you believe the Court should take further in making this record and, two, responsive argument as to the propriety of judicial intervention in terms of compelled testimony and judicial grant of immunity?

MS. SHOTWELL: Thank you, Your Honor, just briefly.

First, the Government certainly wants to dispel any notion that it has actively discouraged Mr. Edwards from testifying in this matter. What we have done is communicated to Mr. Sarcone the potential consequences should Mr. Edwards testify in a manner that the Government believes to be false and that the Court were to find to be false. That does include sentencing considerations and new charges like perjury.

The Court's grant of immunity for his testimony is an extraordinary mechanism that is not designed for a case like this. The Government is not trying to manipulate the outcome or manipulate the presentation of evidence by selectively offering immunity only to people with favorable testimony.

What the Government has done is declined to offer immunity to support testimony that the Government believes will be false and that the Government believes the evidence will conclusively show is false.

For the Court to then step in and provide immunity under those circumstances is not warranted, nor is it based in any of the case law that Mr. Bertogli cited.

Certainly, as we have previously said and stated many times, if Mr. Edwards wishes to testify, he certainly can do so. Mr. Sarcone has represented to us and has represented again here today that he intends to assert his Fifth Amendment right, and really, from the Government's perspective, the

inquiry should end at that point.

THE COURT: Thank you.

Mr. Bertogli, would you like to be heard?

MR. BERTOGLI: Well, Your Honor, I think I -- briefly to summarize my position stated in my resistance to the Government's motion in limine, at least sections 2 and 3 of that pleading.

The first, I guess, requirement of the case law that I'm aware of that talks about and recognizes and sets forth the standards regarding judicial immunity says that the Government has to be requested to grant immunity. To the extent -- to meet that requirement, in my resistance filing, I have requested that the Government provide immunity to Mr. Edwards so as allow him to testify and to comply with Mr. Simmons's right of compulsory process under the Constitution. And I assume that the Government is declining that given their position stated this morning.

The next step would be that the Court order the Government to provide immunity, and if the Court declines to do that, that the Court fashion a remedy so as to provide for a fair trial in this case and fundamental justice as in the language of the cases that I've cited, including *Virgin Islands v. Smith* and the *Lowell*, *Nolan*, and *Garner* case references, as it relates to what the standards are for the granting of judicial immunity.

The Eighth Circuit, while I will obviously, as stated in my pleading, recognize that the Eighth Circuit has not gone so far as to recognize the concept of judicial immunity under *Capozzi*, nonetheless discussed when it would be appropriate and when it wouldn't be.

In that case, obviously, they didn't grant -- or find any error by the district court in failing to grant the judicial immunity there because, uniquely, the facts in that case were that the witnesses who were requested by the defendant in that case to be given judicial immunity had already testified under oath in a civil proceeding such that their deposition testimony was -- the district court invited defense counsel in that case to use their prior sworn statements, the deposition testimony, in any way or fashion that the defendant in that case thought it would be beneficial to him in his defense to the criminal case.

We don't have that here. We don't have any sworn deposition testimony. We don't have any sworn testimony under oath by Mr. Edwards that could be substituted for his live testimony.

Additionally, at this point in time, it's the Friday before the Monday beginning trial. He's been provided with a writ ad testificandum for Tuesday after the Government would -- or whatever period of time the Government takes to provide -- to state their case. After they rested, I would propose to

call Mr. Edwards as a defense witness, and it would be then and only then that he would be able to make a decision as to whether or not he wanted to assert his rights of Fifth Amendment.

THE COURT: Is it your position that counsel's statement is insufficient for purposes of the record, that he has to be called -- you think the case law supports the fact that he personally has to be called to the stand and has to assert in order for the record to demonstrate that he intends to assert?

MR. BERTOGLI: Well, I think that the record needs to be made, not in front of the jury, but at least during the trial, that an out-of-presence hearing of the jury would need to be conducted to determine whether or not he would indeed be asserting his Fifth Amendment right against self-incrimination at that time. I don't believe that just a statement of counsel that is 72 hours or more in advance of when he would be required to make that decision is sufficient to answer the question is he going to take the Fifth or not, you know.

So I think that -- yes. I think the record needs to be made closer to the time that he actually is called to testify, but out of -- I would say it would be out of the presence of the jury because it's my understanding that you can't call a witness just to have them take the Fifth in front of the jury.

So I understand that's the case, but it would certainly be more appropriate to have him actually, out of his own mouth, take the Fifth Amendment or not as opposed to rely upon statements of counsel.

It's a very personal right. Whether or not Mr. Sarcone may or may not have advised him is one thing, whether he takes that advice, if indeed that is what it is -- I don't want to pry into attorney-client privileges here. But it's a personal decision that he has to make based upon the actual timing of the event as opposed to some prior stated intention of counsel.

That's my position as it relates to the record that would be necessary with Mr. Edwards. It has to be made -- I think the record has to include him because it's his right he would be asserting or not.

THE COURT: Thank you.

Specifically as to the sufficiency of Mr. Sarcone's representations, Ms. Shotwell.

MS. SHOTWELL: Your Honor, the Government believes that Mr. Sarcone's representations of Mr. Edwards' intent would be sufficient. Certainly throughout a criminal case, we rely on defense counsel to make representations on their client's behalf routinely. This is not a situation where the defendant would be testifying in his own trial and it would be important that the Court make a personal colloquy.

However, certainly if the Court wishes to have Mr. Edwards here to make that record outside the presence of the jury, the Government has no objection. We simply believe that Mr. Sarcone's representations are sufficient.

THE COURT: Thank you.

Mr. Bertogli, anything further?

MR. BERTOGLI: Yes. Answering that question and getting back to the concept of judicial immunity --

THE COURT: I mean, let's make it clear. You said that the Eighth Circuit hasn't addressed it, but the Eighth Circuit specifically called it an extraordinary remedy and that it's not in any way founded -- quoting the Eighth Circuit, "Copozzi did not seek an order from the district court compelling the Government to immunize these witnesses. Instead, he invited the district court to fashion an extraordinary remedy: judicial immunity, 'the power of a Court, unaided by statute, to order that a witness's testimony cannot be used against him.'"

And that's the extraordinary remedy you're requesting this Court use should the Government, as it indicated, decline to grant Mr. Edwards immunity for his testimony in this trial?

MR. BERTOGLI: That's correct, Your Honor. I've stated the *Copozzi* court -- it's my understanding it's the only Eighth Circuit case that's addressed the concept of judicial immunity, recognizing that other circuits have recognized that,

but not going as far as saying we think such an animal exists, but we think that in this case that the facts under *Copozzi* didn't merit it. That's what they said.

I don't think that they claimed an overall statement that it could never be given, and certainly "extraordinary circumstances" is a suggestion that it can be -- that it can be granted under those exceptional or extraordinary circumstances.

And I think on a case-by-case basis, weighing the defendant's right to compulsory process and to provide due process in a criminal trial as against a defendant's right against self-incrimination and fashioning a remedy so as to allow compulsory process to exist, the judicial immunity concept discussed and recognized by the Eighth Circuit and the other circuits that I've cited certainly suggests that far more has to happen than what happened in that case factually for that remedy to be appropriate.

And what I am suggesting and arguing in this case is that it is appropriate in this case because Mr. Edwards, if he is going to take the Fifth Amendment, it would be only because he's been basically threatened by the Government with withholding acceptance of responsibility and obstruction of justice at his sentencing and possibly perjury charges, which the Government is basing its statements in its motion to continue his sentencing that was set for October -- they filed a motion -- the Government filed a motion to continue

sentencing citing this very trial as a reason to continue his sentencing.

Well, that just means they're going to hold over his head, should he not exercise his Fifth Amendment, an intention to seek enhanced sentencing under the advisory guidelines and -- because they don't believe that if he testifies at a trial in this case consistent with the prior notarized statement that he provided, that that's the truth.

Well, obviously, the Government doesn't get to decide what the truth is or not. That's usually -- that's obviously a jury question. And in order to get it before a jury, it has to be presented in some fashion to be determined whether or not he's telling the truth or not. The credibility is not in the hands of the Government. The Government doesn't get to decide who is telling the truth and what the truth is, so --

THE COURT: I think the point of the Government's position -- and it is not improper -- is that by terms of his plea agreement -- the plea agreement requires him to be -- to not act contrary to the law. If they present evidence that what he says is false, then that would, under the Eighth Circuit precedent, be obstruction of justice and allow for a denial of acceptance of responsibility, which would not be an improper use of process to have him held to the terms of his plea agreement.

So I understand your argument, Mr. Bertogli.

MR. BERTOGLI: All right.

THE COURT: I think that your reading of the *Copozzi* case is generous at best and disingenuous on its face. The Eighth Circuit's language in *Copozzi* talks about the fact that every circuit that has considered the Third Circuit's *Smith* holding has held that it's been a violation of the doctrine of separation of powers. "We decline to follow *Smith* and reassert our doubt that the Court has the power to order such a grant of judicial immunity."

That's what they say. That's what I'll follow. There's nothing in that case that suggests that this Court has the authority to do so.

They go on to talk about that even assuming a district court has authority to immunize defense witnesses, unaided by federal statute, it's clear that such an order is an extraordinary remedy, to be used sparingly, and then only when proffered evidence is clearly exculpatory.

I don't need to get to that second discussion because of the fact that the Eighth Circuit clearly states that they decline to follow *Smith* and they reassert their doubt that the Court has the power inherent in its being to order such a grant of judicial immunity.

So I understand your position, and the Court will not engage in the practice of creating and expanding its authority beyond what is authorized by the Constitution or statute.

For purposes of the record --

Anything else, Mr. Bertogli?

MR. BERTOGLI: Other than -- if the Court's ruling is that the Government is not going to order the -- if the Court is not going to order the Government to grant immunity and the Court is not going to fashion a judicial immunity remedy, then --

THE COURT: Under what authority can I order them to grant immunity?

MR. BERTOGLI: Well, I guess it was -- *Smith* is what I based it on. That was the procedures they were using.

THE COURT: The Eighth Circuit rejected *Smith*. I similarly will follow the Eighth Circuit in rejecting *Smith*. It's a separation of powers issue. I'm not going to order the Government to do something in their -- under their law enforcement authority that they deem inappropriate for purposes of their prosecution of this case. And there is no suggestion anywhere in any of this that they are doing so for any type of unconstitutional purpose in any way that would be violative of due process or the rights of anyone involved.

So, no, I am not going to order them to do it. No, I don't believe that I have the authority inherent in my position to create judicial immunity. And I believe the Government has made clear that they don't intend to offer Mr. Edwards immunity.

Ms. Shotwell, that's accurate?

MS. SHOTWELL: That's accurate, Your Honor.

THE COURT: And the Court notes that he's pleaded guilty and he has a plea agreement, and those are the terms under which he's operating, and that is where -- and even in the *Copozzi* case, they talk about the existence of plea agreements and those terms and what impact they have on these discussions as well.

MR. BERTOGLI: Well --

THE COURT: Thank you, Mr. Bertogli.

MR. BERTOGLI: All right. Thank you.

Whether it's needed in the record or not, I would just distinguish Mr. Edwards' plea agreement in this case didn't call for him to allocute to any facts relating to his relationship with Mr. Simmons or any of the allegations of Count 5 in the indictment regarding the purported distribution of methamphetamine in February of 2020.

In Mr. Edwards' plea agreement, he doesn't actually make any statements about that, so that's the only factual distinction I would offer relating to the contents of his plea agreement. He didn't allocute to any facts related to Mr. Simmons contained in the statement of facts.

THE COURT: I understand your position.

MR. BERTOGLI: Okay. And I understand that's not going to change the Court's decision relating to its authority,

inherent authority, under the Eighth Circuit's *Copozzi* case. I just wanted to make it clear that his plea agreement doesn't provide for him to make -- it didn't provide for him to allocute to any facts relating to his relationship or knowledge of Mr. Simmons's activities.

THE COURT: The Court notes that the plea agreement also contains -- it's at document 228 of the record and includes at paragraph 14 a paragraph entitled Acceptance of Responsibility which specifically states that the Government reserves the right to oppose a reduction under 3E1.1 if, after the plea proceeding, Defendant obstructs justice, does other things, or otherwise engages in conduct not consistent with acceptance of responsibility.

So I will -- based upon the Government's representations that they do not intend to offer Mr. Edwards immunity and my legal determination that I do not have the authority to offer judicial immunity and the Eighth Circuit's rejection of the *Smith* reasoning and Mr. Sarcone's assertion of Mr. Edwards' Fifth Amendment rights, I believe the matter is resolved.

I will spend some time today looking at whether or not I believe that it is in the best interest of the record to have Mr. Edwards personally appear and make a record on Tuesday. I'll also discuss with the marshals what the logistics of that would look like because, obviously, transportation would be

complicated because he would need to be transported separately from these defendants, so that is the only aspect of this decision that remains outstanding.

The Court will communicate -- so, for all the reasons I've stated, the request for the -- because Defendant Edwards has indicated he intends to assert his Fifth Amendment right and the Court is not going to compel that testimony through any of the means suggested by the defense -- to the extent it's a motion from the defense, that's denied. To the extent that it's a motion from the Government to keep him from testifying, that's granted.

But I leave open the issue of whether or not Mr. Edwards will appear personally to do that. We'll address that as soon as we can. It would not be Monday. It would be Tuesday, and, of course, it would be outside the presence of the jury.

I want to look at the case law and see what it suggests the best record is so that Mr. Bertogli can have the record he needs for appeal and the Court has the benefit of whatever the other courts have done as guidance.

Any additional record in that regard from the Government?

MS. SHOTWELL: No, Your Honor, not with respect to Mr. Edwards' testimony specifically. The Government would like to address the admissibility of the notarized statement at some

point.

THE COURT: Right. Mr. Sarcone doesn't need to be here for that, though.

Mr. Bertogli, any additional record in that regard?

MR. BERTOGLI: No, Your Honor.

THE COURT: Mr. Dyer, you don't have a dog in this fight, but any record in that regard?

MR. DYER: I don't have any record. Thank you.

THE COURT: Thank you.

Mr. Sarcone, anything else you need to bring to the Court's attention?

MR. SARCONE: Just to the extent, Your Honor, I don't know how logistically it's going to work, but Monday I am up in northwest Iowa all day.

THE COURT: You would not be required to be in court on Monday. We will select a jury on Monday. The Government will present its case in chief. If the Court decides it's prudent to have Mr. Edwards personally appear, I would ask for you to be present at the same time, but also it would not be until Tuesday.

MR. SARCONE: Okay. Great. Thank you, Your Honor.

THE COURT: Thank you. And you are excused from these proceedings.

MR. SARCONE: Thank you.

THE COURT: All right. So that addresses that issue.

P R O C E E D I N G S

(In open court, with the defendants present, outside the presence of the prospective jury panel.)

THE COURT: Thank you. Please be seated.

Good morning. We are here in the matter of the United States of America versus Terry Eugene Hambrick and Kieffer Michael Simmons, 4:20-cr-189. This is the time and date set for trial in this matter. My name, as you know, is Rebecca Goodgame Ebinger, and I'm the district judge presiding.

If counsel would please identify themselves for purposes of the record.

MS. TUBBS: MacKenzie Tubbs and Mikaela Shotwell on behalf of the United States. We're also joined by Joseph Christensen at counsel table as case agent.

MR. DYER: Jonah Dyer on behalf of Terry Hambrick, who is seated here to my right.

MR. BERTOGLI: Joe Bertogli on behalf of Kieffer Simmons.

THE COURT: Thank you.

So we had a final pretrial conference last week. We left a couple of issues outstanding that I wanted to talk about quickly this morning. The first is the issue in regards to Mr. Edwards' assertion of his Fifth Amendment right. Mr. Sarcone, his attorney, very clearly stated on Friday morning that Mr. Edwards intended to assert his Fifth Amendment

right not to testify.

I have reviewed the case law on this. I have not been able to find anything that suggests that a personal invocation of that is required. The Eighth Circuit's leading case on this that I find instructive is *Washington*, and in that case, the discussion was all with the witness's counsel.

Mr. Bertogli, are you aware of any authority that requires the personal invocation of the Fifth Amendment right for a witness?

MR. BERTOGLI: I'm not aware of any case law, Your Honor, but, obviously, over the course of the years where that issue has come up, it's been my understanding in the last 35 years through Judges Vietor, Wolle, Longstaff, that the record made was with the defendant personally at or close to the time of trial outside the presence of the jury to determine whether or not that individual was going to assert their rights of self-incrimination under the Fifth Amendment or not.

THE COURT: Thank you, Mr. Bertogli.

So the Court has reviewed the case law. I respect my colleagues, and, of course, those esteemed jurists mentioned by Mr. Bertogli undoubtedly have the discretion to proceed as they see fit.

In my reading of the law and based upon the record we made on Friday, I can find no authority that requires such action to be taken.

The question for the Court is whether there has been a record made that establishes that the witness intends to invoke his Fifth Amendment right and whether or not such a right is properly invoked because there are substantial and real risks for self-incrimination and that it's not trifling or imaginary.

Here the record supports that finding. The United States indicated that it believed the testimony would involve the drug transaction on February 28. The letter originally provided to the Court back in April deals with the February 28 drug transaction that Defendant Leon Edwards has not otherwise admitted, and the Government's filing in regards to the potential for prosecution for perjury or obstruction of justice, as filed with the Court in their motion to continue sentencing, further supports the real and substantial risk of self-incrimination facing Mr. Edwards should he choose to testify.

Based upon that record, the Court does find that the witness's invocation of his right not to testify through counsel is justified and no further record is required.

Any additional record in that regard from the Government?

MS. TUBBS: No, Your Honor.

THE COURT: Ms. Tubbs, I believe we covered this on Friday with Ms. Shotwell, but you're aware of no authority that requires Mr. Edwards to personally invoke his Fifth Amendment

right?

MS. TUBBS: That is correct, Your Honor.

THE COURT: Thank you.

So, with that record, the marshal service is notified that transportation of Mr. Edwards tomorrow will not be required. The record on the matter has been fully made, and the Court's ruling in that regard is as indicated now.

That brings up the issue of the -- that brings up the issue of the proffered defense exhibit. Mr. Bertogli's written materials suggest that should the defendant not be permitted to call Mr. Edwards, that he should be permitted to present the affidavit identified at -- or not affidavit -- the notarized statement identified as Defense Exhibit BB.

Would you like to be heard in that regard, Mr. Bertogli?

MR. BERTOGLI: Yes, Your Honor.

Further, as it relates to the record regarding the personal appearance of Mr. Edwards, Mr. Simmons would, for the record, assert that that additional record with him personally would need to be made in order to preserve that for appeal. The Court has declined to provide Mr. Simmons that opportunity to make that record.

THE COURT: I'm sorry. I've asked you for any authority that requires that. You've told me you don't know of any, and you're now saying that I am not allowing you to make a

record. The record is made that you've asked to have Mr. Edwards personally appear. His counsel appeared and put forth the record that is required under *United States v. Washington*, and so I'm unclear as to what record you're further making now.

MR. BERTOGLI: Other than I disagree and, for the purposes of the record, would assert that personal presence is required for purposes of furthering that on appeal. That's all.

THE COURT: Noted. I asked you about your argument in regards to the admission of Exhibit BB.

MR. BERTOGLI: Correct. And I would, as in the written materials, urge that Exhibit BB should be admitted out of fundamental fairness since Mr. Simmons is being deprived of his rights to compulsory process by virtue of the exercise of Mr. Edwards' Fifth Amendment right against self-incrimination.

I would urge that Rule 807 of the Federal Rules of Evidence applies because the statement under subparagraph 1 of that rule is supported by sufficient guarantees of trustworthiness considering the totality of the circumstances under which it was made, and, number two, that it's more probative on the point for which it's offered because there's no other evidence available to Mr. Simmons which would -- which he could obtain expending reasonable efforts to provide that evidence. The motions were -- or the writ of -- the writ of ad

testificandum has been essentially denied as Mr. Edwards' personal presence is not allowed.

Under subparagraph 3, I note the Government has been on sufficient notice since at least April of 2021 of the existence of Mr. Edwards' statement and certainly could have taken whatever means necessary they deemed required to attempt to dispute the offers of evidence made in that statement.

And under the record in this case, Mr. Simmons has done all that he can do in order to secure personal presence and would urge that under Rule 807 that proposed Exhibit BB should be admitted in order to present the best evidence that is available on the subject of the participation of Mr. Edwards -- Mr. Simmons in the February 28, 2020, alleged drug transaction which is the subject of Count 5 and also an overt act charged in Count 1 of the conspiracy.

THE COURT: This is a drug case. The conspiracy does not, by my reading of the amended indictment, enumerate overt acts; am I correct?

MR. BERTOGLI: That's correct, Your Honor. But, obviously, in order to prove conspiracy, you have to prove a willing participation in an agreement, and certainly the Government's theory of the case that the February 28 incident and events -- certainly would be, I'm sure, offered by the Government not just to prove Count 5 but also to prove Mr. Simmons' participation in an agreement to distribute

methamphetamine between the dates alleged in the conspiracy --

THE COURT: Just so the record is clear, Mr. Bertogli, that is not enumerated as an overt act under Count 1 in the indictment; correct?

MR. BERTOGLI: That's correct.

THE COURT: Thank you.

And to be clear, Mr. Edwards did not plead guilty to Count 5; correct?

MR. BERTOGLI: That's correct.

THE COURT: Thank you.

On behalf of the United States, responsive argument as to proposed Exhibit BB?

MS. TUBBS: Your Honor, BB is hearsay and no exception applies. Arguing that the residual exception applies is not applicable here. It's simply a written statement of a co-defendant. There are no sufficient guarantees of trustworthiness that would allow the Court to rely on that exception, and because it's hearsay, it's not admissible.

THE COURT: So as we discussed on Friday, the right to compulsory process under the Constitution is not unlimited in that the Supreme Court has recognized that the Fifth Amendment right against self-incrimination forecloses the ability to call a witness who would so incriminate themselves.

So the fact that Mr. Simmons is unable to call Mr. Edwards is not violative of his rights as set forth by the

Constitution and interpreted by the United States Court of Appeals for the Eighth Circuit and the United States Supreme Court.

That being said, the question is whether the proffered Exhibit BB has sufficient indicia of reliability to otherwise be admissible under the rules of evidence. It is a statement -- an out-of-court statement being offered for the truth of the matter asserted. It is not being offered by a party-opponent. It is being offered by the defendant for purposes of its truth, and the residual exception requires that there be sufficient guarantees of trustworthiness in order to allow the exhibit to be admitted.

The Court cannot make such a finding, and so the residual exception does not allow for the admission of Exhibit BB, and the Court will deny the motion for its admittance. The Government's objection to BB is sustained, and BB will not be admitted or referenced in any way throughout the course of the trial.

Any additional record in that regard from the Government?

MS. TUBBS: No, Your Honor.

THE COURT: From the defense, Mr. Bertogli?

MR. BERTOGLI: No further record.

THE COURT: Thank you.

As to Mr. Hambrick, I received some communication over

A. We tried to figure out -- well, Kieffer had sold -- got some drugs -- some methamphetamine, actually, out from underneath the seat in a case, and then he started to weigh it up. He had a few different baggies -- bags.
Q. And what was he doing with the bags?
A. Basically consolidating them, putting them all into one, seeing what he had.
Q. And how much methamphetamine did you buy from Kieffer Simmons?
A. Two and a half ounces.
Q. How did you know how much methamphetamine you were buying from him?
A. Because he weighed it right in front of me.
Q. Who all was in the Durango with you?
A. I would have been in the backseat. Leon would have been in the passenger -- front passenger, and Kieffer was in the driver seat.
Q. Did you pay Kieffer Simmons for that methamphetamine?
A. Yes.
Q. How much?
A. 900.
Q. Did you talk about anything else after that drug deal took place?
A. We talked about purchasing firearms and a pistol, but the ones that he had weren't for sale. They were the ones that he