No. _____

In the Supreme Court of the United States

WILLIAM LOGSDON, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The Sixth Amendment of the U.S. Constitution guarantees a criminal defendant the right to seek compulsory process to call witnesses in his favor. When the trial court accepts a defense witness's blanket assertion of the Fifth Amendment privilege against self-incrimination outside the presence of the jury, however, the accused's ability to present a defense is thwarted—and the jury never knows the accused tried to bring the witness's testimony before it.

The question presented is:

When a criminal defendant seeks testimony from a witness who asserts the Fifth Amendment privilege as to all questions, must the district court make a particularized inquiry into the scope of that privilege before accepting it and, even if accepted, allow the witness to be called to invoke the privilege before the jury or otherwise inform the jury about the invocation?

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Petitioner William Logsdon asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on October 21, 2024.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Logsdon*, No. 7:22-cr-00248-DC-2 (W.D. Tex. Sept. 19, 2023) (judgment)

- *United States v. Logsdon*, No. 23-50682 (5th Cir. Oct. 21, 2024) (unpublished opinion)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

DECISION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Logsdon*, No. 23-50682 (5th Cir. Oct. 21, 2024) (per curiam), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 21, 2024. Pet. App. A. This petition is filed within 90 days after entry of judgment or order sought to be reviewed. *See* Sup. Ct. R. 13.1, 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "No person shall be … shall be compelled in any criminal case to be a witness against himself…."

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right … to have compulsory process for obtaining witnesses in his favor…."

STATEMENT

William Logsdon was a high school history teacher and lacrosse coach who invested his life savings in oil and gas royalties based on the advice of his mother-in-law, Jamie Thompson, who had experience in the industry. He mentioned his good returns to family and friends who invested with Thompson. But the investments were not real. It was a Ponzi scheme, and Thompson—even according to the government—was the mastermind. Thompson created a fake company and fake documents to make investors think they had invested in oil override royalties. They had not. Any disbursements they received came from other investors' money.

In October 2022, both Thompson and Logsdon were indicted as co-defendants for wire fraud offenses. Two months later, Thompson pleaded guilty to wire fraud and to conspiring with Logsdon to commit wire fraud, but Logsdon elected to proceed to trial. In May 2023, the Grand Jury returned a superseding indictment that named only Logsdon as a defendant. It charged him with conspiracy to commit wire fraud and four counts of aiding and abetting

wire fraud. *See* 18 U.S.C. §§ 2, 1343, 1349. Logsdon proceeded to trial on the superseding indictment.

At trial, Logsdon did not contest that the investment scheme was fraudulent. He argued that he was also defrauded by Thompson and had encouraged friends and family to invest with Thompson's company, National Royalty Group (NRG), not knowing that the investments were fake. The government conceded that "Thompson was the ringleader of this" scheme. C.A. ROA.419–20. But it argued that Logsdon at some point knew that the investments were not real, yet he continued to recruit new investors.

The government presented evidence that Logsdon recruited investors by claiming that he was making money from his past investments (even though he was not), told investors he was investing in the same projects they were (even though he never received distribution checks), and told investors he was checking into the lateness of the distribution checks (even though there was no entity to check with other than Thompson). The government rested without calling Thompson as a witness.

Before the defense presented its case, defense counsel notified the district court that it intended to call Thompson as a witness. The court addressed Thompson and her attorney outside the pres-

ence of the jury. Thompson's attorney stated that Thompson intended to exercise her Fifth Amendment right to remain silent, although the attorney was not sure if Thompson would do a blanket statement or if the request would come up repeatedly.

The district court addressed Thomspon but did not place her under oath. The court told Thompson, "if you testify, you're testifying. … [O]ther than yeah, this is my name, this is my address, that sort of thing, if you testify as to anything substantive, you open yourself up to testify." C.A. ROA.870. The court reiterated, "You can't answer just the questions you want to answer and not answer others." C.A. ROA.870. The court also told Thompson that, if the court believed she was committing perjury, she could receive a higher sentence. C.A. ROA.871. Thompson responded that she "plan[s] to invoke the Fifth." C.A. ROA.871. Without further inquiry into the scope of her privilege or whether each question the defense intended to ask would risk an incriminating response, the court accepted Thomspon's blanket assertion of her Fifth Amendment privilege. The court further stated that it would not let Thompson be called just to invoke the Fifth Amendment in front of the jury. C.A. ROA.872.

Logsdon then informed the district court that, because Thompson was now an unavailable witness, he intended to introduce an

affidavit Thompson executed about a month before trial as a statement against penal interest. C.A. ROA.874; *see* Fed. R. Evid. 804(b)(3). In the affidavit, Thompson declares under penalty of perjury and before a notary that "Logsdon never handled any checks, never made any deposits, and had no knowledge of any of my actions in this case." C.A. ROA.155. She described Logsdon as a "victim" who did "not have the business acumen or capacity to envision or understand a scheme like this." C.A. ROA.155. She said she put Logsdon's phone number on documents and used his P.O. Box without his knowledge, and that Logsdon "in no way participated in any conspiracy." C.A. ROA.156. The district court refused to allow Logsdon to question Thompson to lay the foundation for the affidavit's admission and sustained the government's objection to its admission. C.A. ROA.872. The court explained that the affidavit was not "sufficiently reliable" and that "the prejudicial impact would substantially outweigh any probative value[.]" C.A. ROA.952.

The jury never learned that Logsdon attempted to call Thompson as a witness or that she had executed the affidavit inculpating her and exculpating Logsdon. Logsdon testified that he had "absolute trust" in Thompson's business information. C.A. ROA.1029,

1064. He believed the investments were making his family "financially safe." C.A. ROA.1011. He was "shocked" when he learned that NRG was just Thompson. C.A. ROA.1044. Logsdon provided innocent explanations for other circumstances that may otherwise seem suspicious, including that he responded to investors' inquiries about the late distribution checks by relying what Thompson told him.

The jury found Logsdon guilty of all counts, and he was sentenced to 108 months' imprisonment.

On appeal, Logsdon challenged the district court's acceptance of Thompson's blanket assertion of her Fifth Amendment privilege without further inquiry and asked that the case could be remanded for the inquiry and for the district court to determine whether the invocation should occur in front of the jury. He also challenged the exclusion of Thomspon's affidavit.

The court of appeals affirmed. The blanket Fifth Amendment assertion, the court held that the district court did not obviously err by concluding that Thompson had a reasonable apprehension of self-incrimination from her responses to essentially any questions relevant to Logsdon's defense. Pet. App. 2. The court also held that the district court did not clearly err in finding the affidavit to be untrustworthy. Pet. App. 2.

REASONS FOR GRANTING THE WRIT

The Court should address the tension between a criminal defendant's Sixth Amendment right to compel witnesses and a witness's Fifth Amendment right against self-incrimination.

A person accused of a crime has the right to "present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see* U.S. Const. amend. VI. In plain terms, "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is … the right to present a defense, the right to present the defendant's version of the facts … to the jury so it may decide where the truth lies." *Washington*, 388 U.S. at 19.

In tension with a defendant's right to compel witnesses and present a defense is a witness's privilege against self-incrimination. U.S. Const. amend. V. The privilege "not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). A "witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of it-self establish the hazard of incrimination." *Id.* Rather, the court must determine "whether his silence

is justified." *Id.* The protection against self-incrimination "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Id.*

Following *Hoffman*, courts recognized that "[a] blanket refusal to testify is unacceptable. A court 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).

But courts have let an exception swallow the particularized-inquiry rule by allowing a blanket assertion of privilege when the district court summarily concludes that the witness's answer to any question would be incriminating. *See, e.g.*, *United States v. Santiago*, 566 F.3d 65, 70 (1st Cir. 2009); *United States v. Bates*, 552 F.3d 472, 475–76 (6th Cir. 2009); *United States v. Mares*, 402 F.3d 511, 514–15 (5th Cir. 2005); *United States v. Reyes*, 362 F.3d 536, 541–42 (8th Cir. 2004); *United States v. Deutsch*, 987 F.2d 878, 883–84 (2d Cir. 1993); *United States v. Harris*, 542 F.2d 1283, 1298 (7th Cir. 1976). This happened in Logsdon's case. He could not present Thompson's testimony or her affidavit to support his defense

because the court accepted her blanket privilege assertion and determined that her affidavit was untrustworthy. The jury never learned that Logsdon tried to present this critical evidence.

This Court has not addressed whether a defense witness who invokes the Fifth Amendment as to all questions must do so in front of the jury, or if the jury must otherwise know about the thwarted attempt to call the witness. But in other contexts, the Court has not endorsed a rigid approach to privileges. For instance, the Court recognizes that "the prevailing rule" is "that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano*, 425 U.S. 308, 318–19 (1976) (citing 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)). This recognizes that, "[i]n part, policies underlying the Fifth Amendment are directed at diminishing the force which can be brought to bear upon an individual by the government." *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 521–23 (8th Cir. 1984) (citing *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964), *abrogated on other grounds by United States v. Balsys*, 524 U.S. 666 (1998); *Baxter,* 425 U.S. at 335 (Brennan, J., dissenting)). Of course, here, Logsdon is the individual facing the government's full force, not Thompson.

Perhaps realizing that different situations could warrant different rules, the court of appeals once recognized that the "district court must decide in its informed discretion whether" a defendant "should be allowed to elicit [the witness's] refusal to testify before the jury or to comment on that refusal." *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir. 1975). But the federal courts of appeals have now coalesced around a rule that "the defendant has no right to call the witness to the stand merely to force invocation of that right before the jury." *United States v. Lyons*, 703 F.2d 815, 818–19 (5th Cir. 1983) (collecting Fifth Circuit cases); *see also Bowles v. United States*, 439 F.2d 536, 541–42 (D.C. Cir. 1970) (en banc) (holding that a witness should not be put on the stand for the purpose exercising his privilege before the jury, partly because the "jury may think it high courtroom drama"); *United States v. Deutsch*, 987 F.2d 878, 883 (2d Cir. 1993) (collecting cases from most federal circuit courts).

The federal courts of appeal have settled on a rule that infringes upon a criminal defendant's right to present a defense when a defense witness invokes the Fifth Amendment privilege. This Court correct this flawed rule.

Indeed, some state courts have recognized the pitfalls of the majority approach which allows defense witnesses to invoke their

Fifth Amendment privilege outside the presence of the jury in criminal cases. *See, e.g.*, *Rios-Vargas v. People*, 532 P.3d 1206, 1216 (Colo. 2023) ("defendants are entitled to question a nonparty alternate suspect in the jury's presence"); *State v. Herbert*, 234 W. Va. 576, 585 (2014) ("in a criminal trial, when a non-party witness intends to invoke the constitutional privilege against self-incrimination, the trial court shall require the witness to invoke the privilege in the presence of the jury").

First, the majority approach "impedes a defendant's fundamental right to present a complete and strong defense . . . . Even though juries are instructed to presume a defendant's innocence, they may still improperly infer a defendant's guilt when an important witness fails to testify[.]" *Herbert*, 234 W. Va. at 585. Second, "[a]llowing a witness to avoid taking the stand because he/she intends to refuse to testify directly contradicts" the requirement for a particularized inquiry because "[i]t allows the witness to unilaterally avoid answering relevant, non-incriminating questions." *Id.* Third, it prevents the possibility that "a witness who intends to invoke the privilege against self-incrimination may change his/her mind and testify once being placed on the stand." *Id.* Fourth, "excluding a defense witness from the jury's presence would impinge on" the fundamental right of compulsory process "for reasons outside the

defendant's control." *Id.* at 585. And "when a witness is especially important to the defense (*e.g.,* when the witness is a co-accused), excluding the witness from the jury's presence may cause jurors to unfairly assume that the defense was frivolous or insincere because they did not see the witness be questioned." *Id.* at 586.

Here, Logsdon—the accused on trial facing the full power of the government—was seeking the testimony of a nonparty and alleged co-conspirator, Thomspon, the mastermind of the fraudulent scheme and his mother-in-law who he entrusted with his financial affairs. Outside the presence of the jury, Thompson asserted her Fifth Amendment right to not answer any question. Without conducting a question-by-question inquiry, the court accepted Thompson's invocation and prevented Logsdon from calling Thompson to the stand to invoke the privilege before the jury. Given that Thompson simply told the trial court that she just *planned* to invoke her privilege and given that she had executed an affidavit exculpating Logsdon, there is a strong possibility that she would have changed her mind on the stand when asked specific questions. But this "change of heart" could not happen because she was "not first put on the stand and required to answer non-incriminating questions." *Herbert*, 234 W. Va. at 585. Thompson's blanket assertion of her Fifth Amendment privilege combined with the jury

never knowing that Logsdon attempted to call her as a witness unfairly prevented him from presenting his defense and risked causing jurors to unfairly assume that Logsdon's defense—that he never knew that Thompson's investments were fraudulent—was "frivolous or insincere." *Id.* at 586.

In some situations, "our sense of fair play" counsels against forcing a witness to incriminate herself. *Murphy*, 378 U.S. at 55. But "fair play" cuts the other way when a criminal defendant's witness exerts the privilege against self-incrimination. The Court should grant certiorari to clarify that, because such invocation infringes on the defendant's right to present a defense, the court must make a particularized inquiry establishing whether the privilege protects answers to each line of questioning, and, even if the privilege applies to all questions, the witness should be called to invoke the privilege before the jury.

CONCLUSION

FOR THESE REASONS, Logsdon asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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