

NO:

IN THE  
SUPREME COURT OF THE UNITED STATES

DIEUDRUCH EMMANUEL,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

REVISED  
PETITION FOR WRIT OF CERTIORARI

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**QUESTION PRESENTED FOR REVIEW**

I. WHETHER THE MARITAL PRIVILEGE WARRANTS LIMITING THE WIFE'S TESTIMONY UNDER EXTRAORDINARY CIRCUMSTANCES WHEN FAILURE TO DO SO WILL ALLOW HIGHLY PREJUDICIAL EVIDENCE OF LIMITED PROBATIVE VALUE?

## **INTERESTED PARTIES**

Counsel for the Petitioner, Dieudruch Emmanuel, certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. Robert Adler, Assistant Federal Public Defender;
2. Richard Artur, Co-Defendant;
3. Danielle Croke, Assistant U.S. Attorney;
4. Dieudruch Emmanuel, Petitioner;
5. Jack A. Fleishman, Defense Counsel;
6. Yeney Hernandez, Assistant U.S. Attorney;
7. Mitchell Hyman, Assistant U.S. Attorney;
8. Markenzy LaPointe, U.S. Attorney;
9. Honorable Shaniek M. Maynard, Magistrate Judge;
10. Daniel Matzkin, U.S. Attorney;
11. Richard L. Rosenbaum, Esq., Appellate Counsel;
12. Honorable Bruce E. Reinhart, U.S. Magistrate;
13. Honorable Robin L. Rosenberg, U.S. District Judge;
14. Lisa Tobin Rubio, Assistant U.S. Attorney;

15. Emily Stone, Assistant U.S. Attorney
16. Rinku T. Tribuiani, Assistant U.S. Attorney;
17. Patrick David Wilson, Esq.;
18. No publicly traded company or corporation has an interest in the outcome of this appeal.

## **TABLE OF CONTENTS**

|  | <u>PAGE</u> |
|--|-------------|
| QUESTION PRESENTED FOR REVIEW.....           | i           |
| INTERESTED PARTIES.....                      | ii-iii      |
| TABLE OF CONTENTS.....                       | iv          |
| APPENDIX INDEX.....                          | v           |
| TABLE OF CITATIONS AND AUTHORITIES.....      | vi-vii      |
| PETITION.....                                | 1-39        |
| OPINION BELOW.....                           | 2           |
| STATEMENT OF JURISDICTION.....               | 2           |
| STATUTORY AND OTHER PROVISIONS INVOLVED..... | 2-3         |
| STATEMENT OF THE CASE.....                   | 3-8         |
| STATEMENT OF THE FACTS.....                  | 9-31        |
| REASONS FOR GRANTING THE WRIT.....           | 31          |
| ARGUMENT.....                                | 31-39       |
| CONCLUSION.....                              | 39          |

## APPENDIX

Decision of the Eleventh Circuit Court of Appeals in

*United States v. Dieudruch Emmanuel*, Case No: 23-10125

|                            |     |
|----------------------------|-----|
| (December 2, 2024)         | A-1 |
| Indictment                 | A-2 |
| Judgment imposing sentence | A-3 |

## **TABLE OF CITATIONS AND AUTHORITIES**

### **Cases**

|   |    |
|---|----|
| <i>Guerrier v. State</i> , 811 So. 2d 852 (Fla. 5th DCA 2002) .....                   | 32 |
| <i>Hill v. State</i> , 846 So. 2d 1208 (Fla. 5th DCA 2003) .....                      | 32 |
| <i>Kleiman v. Wright</i> , 2021 U.S. Dist. LEXIS 40195 (S.D. Fla. 2020) .....         | 36 |
| <i>Lamport v. Williams</i> , 2014 W.L. 1260514 (S.D. Fla. June 3, 2014) .....         | 36 |
| <i>McDermott v. State</i> , 360 So. 3d 1213 (Fla. 5th DCA 2023).....                  | 33 |
| <i>Pereira v. United States</i> , 347 U.S. 1 (1954).....                              | 37 |
| <i>Trammel v. United States</i> , 445 U.S. 40 (1980) .....                            | 36 |
| <i>United States v. Christiansen</i> , 2019 US Dist. LEXIS 6167 (CD ILL. 2019) .....  | 35 |
| <i>United States v. Majia</i> , 655 F.3d 126 (2 <sup>nd</sup> Cir. 2011) .....        | 38 |
| <i>United States v. Mendoza</i> , 574 F.2d 1373 (5th Cir. 1978).....                  | 33 |
| <i>United States v. Williams</i> , 579 Fed. Appx. 837, 2014 U.S. App. LEXIS 17221.... | 36 |

### **Other Authorities**

|   |        |
|---|--------|
| Fifth Amendment, United States Constitution .....               | 2      |
| Sixth Amendment, United States Constitution .....               | 3      |
| Part III, Rules of the Supreme Court of the United States ..... | 2      |
| Rule 10, Supreme Court Rules.....                               | 31     |
| Rule 10.1, Supreme Court Rules.....                             | 2      |
| Rule 13.1, Supreme Court Rules .....                            | 2      |
| Rule 403, Fed.R.Evid. .....                                     | 34, 36 |
| Rule 410, Fed.R.Evid .....                                      | 38     |
| Rule 501, Fed.R.Evid. .....                                     | 36     |
| Rule 507, Fed.R.Evid. .....                                     | 36     |
| Rule 52(b), Fed.R.Crim.P.....                                   | 3      |

## **TABLE OF CITATIONS AND AUTHORITIES (cont'd)**

|                                      |        |
|--------------------------------------|--------|
| Section 3553(a), U.S.S.G. ....       | 8      |
| Section 3B1.1(a), U.S.S.G. ....      | 6      |
| Section 90.504, Fla.Stat. ....       | 33, 36 |
| Title 18 U.S.C. Section 3742 ....    | 2      |
| Title 21, U.S.C. Section 853 ....    | 5      |
| Title 28 U.S.C. Section 1254(1) .... | 2      |
| Title 28 U.S.C. Section 1291 ....    | 2      |

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Dieudruch Emmanuel respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit rendered and entered in Case No: 23-10125 in that court on December 2, 2024, in *Dieudruch Emmanuel v. United States*, which affirmed the Judgment and Commitment of the United States District Court for the Southern District of Florida. The Judgment was issued as Mandate on December 31, 2024. (R 66-2).

## **OPINION BELOW**

A copy of the 21 page *per curiam* decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the Judgment and Commitment of the United States District Court for the Southern District of Florida, is contained in Appendix (A-1). Also included in the Appendix is the Indictment (A-2) and the Judgment imposing sentence (A-3).

## **STATEMENT OF JURISDICTION**

The decision of the court of appeals was entered on December 2, 2024 (A-1). This petition is timely filed pursuant to Sup. Ct. R. 13.1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), Sup. Ct. R. 10.1 and Part III of the Rules of the Supreme Court of the United States. The district court had jurisdiction because Petitioner was charged with violating federal criminal laws and committing federal criminal offenses. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that Courts of Appeals shall have jurisdiction for all final decisions of United States District Courts.

## **STATUTORY AND OTHER PROVISIONS INVOLVED**

Petitioner relies upon the following constitutional provisions, treaties, statutes, rules, ordinances, and regulations:

- 1) Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; not shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; not shall private property be taken for public use without just compensation

2) Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3) Other case law specified herein.

### **STATEMENT OF THE CASE**

A Criminal Complaint was filed by the Government in *United States v. Richard Artur and Dieudruch Emmanuel*<sup>1</sup> on October 29, 2021. (DK 3-1-14). The Complaint, supported by an Affidavit from Aleida Carvajal, Task Force Officer with the United States Drug Enforcement Administration (hereinafter referred to as “DEA”), alleged a conspiracy to possess with intent to distribute 100 grams or more of a mixture or substance containing a detectible amount of heroin with the

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<sup>1</sup> On May 26, 2022, an Order was entered transferring the prosecution of Richard Artur to Fugitive Status. (DK 65).

conspirators being Dieudruch Emmanuel, Richard Artur and other persons known to the Grand Jury.

According to the agent, in approximately June, 2019, agents from the DEA and the Palm Beach Sheriff's Office (hereinafter referred to as "PBSO") initiated an investigation into drug trafficking activities involving Richard Artur and Dieudruch Emmanuel based upon a "tip" from a DEA confidential informant (hereinafter referred to as "CI"). The Government alleged that "Artur, Emmanuel, and other criminal affiliates were responsible for distributing multi-ounce quantities of heroin in the Palm Beach County area." (DK 3-3).

On November 18, 2021, a nine (9) Count Indictment containing a forfeiture Count was returned against Dieudruch Emmanuel and Richard Artur. Both Defendants were charged with Count I (Conspiracy to Possess with Intent to Distribute 100 Grams or More of Heroin) from August, 2019 through November 9, 2019. Dieudruch Emmanuel was not charged in Counts II, III, IV, V, and VII. In Count VI, Dieudruch Emmanuel was charged with Richard Artur with Conspiracy to Possession with Intent to Distribute Heroin on August 22, 2019. In Count VIII, Dieudruch Emmanuel and Richard Artur were charged with Possession with Intent to Distribute Heroin on November 6, 2019. In Count IX, Dieudruch Emmanuel was charged with Possession with Intent to Distribute Heroin on November 7, 2019. The forfeiture allegations were brought pursuant to Title 21, U.S.C. Section

853. (DK 18-5). Dieudruch Emmanuel was arraigned and a not guilty plea entered on his behalf. (DK 20).

The Government filed a Pre-Trial Notice of Intent to Use 404(b) Evidence and a Notice of Filing Expert Witness Notice. (DK 69; 70). Second and Third Notices of Expert Witness followed. (DK 71; 73).

Prior to trial, the Petitioner filed a Motion in Limine regarding recorded jail phone calls made by Dieudruch Emmanuel to his wife. (DK 85).

The Government filed a Notice of Intent to Rely on Written Declaration Regarding Record of Regularly Conducted Activity. (DK 88). A Notice of Intent to Rely on Certified Copies of Public Records Pursuant to Fed.R.Evid. 902(4) was likewise filed. (DK 91). A Notice of Objection to Government's Proposed 404(b) Evidence followed. (DK 93). The Motion in Limine concerning the recorded jail calls was denied by the Court. (DK 104). The Court entered an Order granting the Petitioner's Motion in Limine directed to 404(b) evidence. (DK 113).

On August 15, 2022, a hearing was held on various matters by the District Judge. (DK 175-1-58). The Court stated

THE COURT: Okay. I will let you argue it in a moment, but in a nutshell, it relates to the Defendant seeking to exclude recorded phone calls between himself and his wife while he was in jail. There were primarily two grounds, as I discern from the briefing, Federal Rule of Evidence 403, where Defense argues that allowing the recordings in are more prejudicial than probative, and also that the communications would be precluded under one of the two privileges, or maybe you will be arguing both, but the spousal privilege. There is a spousal

privilege and a marital communications privilege, and let me just pull that up. (DK 175-3-4).

Trial commenced on September 6, 2022 and lasted four (4) days.

The defense requested one cautionary instruction when the tape between Dieudruch Emmanuel and his wife was played. It was admitted by the Court without objection from the Government. (DK 178-10) The instruction read:

“There are multiple reasons a person charged with a crime might consider pleading guilty or entering into a Plea Agreement with the Government. As with all evidence, you as Jurors have the right to weigh this evidence and determine what a, if any, to get this evidence in arriving at a verdict in this case.” (DK 178-12).

Emmanuel was found guilty as charged as to Counts I, VI, VIII and IX. The amount involved weighed 100 grams or more of heroin. (DK 179-75). The Jury was polled. (DK 179-76-77).

## **Sentencing**

Sentencing was conducted in front of the Honorable Robin L. Rosenberg, District Judge, on December 14, 2022. (DK 160; 180-1-65). Dieudruch Emmanuel elected not to exercise his right of allocution. (DK 180-4).

The Court ruled on the outstanding objections and a defense Motion for Downward Variance. First, Dieudruch Emmanuel objected to the application of Section 3B1.1(a), U.S.S.G., a four level enhancement for being the leader or organizer of criminal activity that involved five or more participants or was otherwise extensive. Dieudruch Emmanuel denied the factual allegations in the

PSI, arguing that the enhancement did not apply as he was not the leader of a drug organization and did not otherwise qualify for enhancement. Second, even if the factual allegations in the PSI were true, Dieudruch Emmanuel argued that the Government failed to prove that the drug operation was sufficiently extensive to warrant application of 3B1.1(a), and third, the Government failed to establish Dieudruch Emmanuel's leadership role.

The Government argued that it was required to prove, by a preponderance of the evidence, that Dieudruch Emmanuel directed one or more people in some fashion. Here, they argued that Dieudruch Emmanuel directed at least Durfille and Artur. The Government argued that Dieudruch Emmanuel exercised decision making authority by setting the prices of the narcotics, the components of the mixture, and fully participated in the offenses, using lower level individuals to complete the deals on his behalf. (DK 180-11).

At sentencing, Agent Abraham Reyes testified for the Government that he was the case agent in this case. He was cross-examined by the defense. (DK 180-22). The Court found that the criminal activity involved five or more participants and that, in addition to Dieudruch Emmanuel, the organization involved Richard Artur, his co-conspirator; the runner, Max Durfille; and the source of the supply, Tyler Roman<sup>2</sup>. Also, Richard Artur had his own customers. The Court found that

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<sup>2</sup> Roman was not charged in the Indictment and his name or role was never discussed at trial.

Dieudruch Emmanuel was an organizer or leader within the organization. (DK 180-26).

The Court found Dieudruch Emmanuel's Total Offense Level was 28, Criminal History II and the custody range was 87 to 108 months. The defense requested that Dieudruch Emmanuel be sentenced between 60 to 77 months. The defense argued that Dieudruch Emmanuel was a deportable alien, which was a significant punishment in and of itself. (DK 180-32). The Court considered the Section 3553(a) factors, and sentenced Dieudruch Emmanuel to a term of 87 months as to each Count, to be served concurrently followed by four years supervised release. (DK 180-47).

On December 22, 2022, Judgment was entered finding that Dieudruch Emmanuel guilty of Counts I, VI, VIII and IX of the Indictment. Dieudruch Emmanuel was sentenced to 87 months on each Count, to run concurrently followed by a four (4) year term of supervised release as to each Count, with all terms to run concurrently. (DK 158-1-3). A Notice of Appeal was timely filed. (DK 159). Judgment was entered on December 22, 2022. (DE 158). This Petition for Writ of Certiorari ensues.

Dieudruch Emmanuel remains incarcerated at FCI Oakdale in Oakdale, LA.

## STATEMENT OF THE FACTS

In the Government's opening statement, the Government argued that the investigation into the drug trafficking organization which they believed Dieudruch Emmanuel was associated with began in June, 2019. (DK 176-131). Law enforcement learned through a confidential source that Dieudruch Emmanuel was active in selling heroin and fentanyl in Greenacres, Palm Beach County, FL. The Government argued that Dieudruch Emmanuel was capable of distributing ounces of heroin. He would negotiate drug deals on the phone or by way of text messages. He used coded language and then sent others, like his brother, Richard Artur, also known as "X," to the complete the drug deals. According to the Government, if a buyer called and Dieudruch Emmanuel felt it was an inconvenient time, he would direct the buyer to his brother to complete the deal.

The Government argued that as part of the investigation, and to try to confirm that Dieudruch Emmanuel was a drug dealer, law enforcement agents used a confidential source to buy heroin from Emmanuel and his associates on several occasions.

During the investigation, the agents applied for and received permission to initiate a wiretap on Richard Artur's phone, but not Dieudruch Emmanuel's. The Government explained that no wiretap was placed on Dieudruch Emmanuel's

phone because law enforcement believed he obtained new phone numbers frequently.

Law enforcement also used an undercover agent to purchase small and then larger amounts of heroin. The undercover agent was introduced to Dieudruch Emmanuel by the confidential informant, and was introduced as the informant's uncle. He was referred to as "Unc." According to the informant, the uncle wanted to establish a source of supply to purchase heroin in Palm Beach County so that he could sell it up north. All in all, the undercover agent engaged in two drug deals with Richard Artur.

### **Trial**

At trial, the Government sought to establish that Richard Artur, Dieudruch Emmanuel and others known and unknown to the Grand Jury conspired to possess with intent to distribute over 100 grams of heroin as charged in Count I of the Indictment. The Government introduced surveillance tapes, text messages, phone calls, pre-wiretap, from the wiretap, and post wiretap, as well as calls and texts from the informant and the testimony of the undercover agent and/or officers from other law enforcement agencies.

Various members of law enforcement testified concerning their involvement in the investigation of Richard Artur and Dieudruch Emmanuel. Palm Beach Sheriff's Agent Osee Dumel testified that he was involved in surveillance on

October 19<sup>th</sup>, primarily focusing on the targets, Richard Artur and Dieudruch Emmanuel. (DK 176-148). Agent Dumel testified that on November 3, 2019, he surveilled Artur's house and saw Dieudruch Emmanuel (the shorter guy) and Artur (the taller guy) with their cars backed in. (DK 176-178). He later surveilled Artur going to "the barber shop." (DK 176-170).

Dieudruch Emmanuel was approximately 5'3" tall and Artur was 6' to 6'2" tall. (DK 176-181-183). Agent Dumel made a courtroom identification of Dieudruch Emmanuel based upon seeing him three times before. (DK 176-188). On cross examination, the officer admitted that he had worked with the informant, known as "Mack". (DK 176-190). The confidential informant's nickname was "Mack" and he claimed to know Dieudruch Emmanuel. (DK 177-18). He admitted the informant was working multiple cases for the agent. However, Agent Dumel denied that he was "my CI." (DK 176-190). The Agent claimed he did not know if the informant was paid, and claimed to be unaware that the informant was "working off a sentence," and attempting to have his sentence reduced. Agent Dumel admitted that his participation in the case was primarily surveillance. He surveilled Richard Artur's address, but admitted that he did not know who owned or leased the home. (DK 176-199).

The agent admitted that he never saw Dieudruch Emmanuel with any drugs on November 3<sup>rd</sup>. (DK 176-192). He did not see Dieudruch Emmanuel make

direct contact with Artur on the 3<sup>rd</sup>. On November 6<sup>th</sup>, he surveilled 2221 White Pines Circle and observed Dieudruch Emmanuel. On November 6, 2019, he did not see Artur, but saw his car at the White Pines Circle address. (DK 176-194). Dieudruch Emmanuel was not doing anything illegal and was not in possession of drugs or contraband that day. (DK 176-192).

Agent Dumel testified that on November 7<sup>th</sup>, he watched as Dieudruch Emmanuel met Artur at the barber shop. It was learned from the investigation that Richard Artur was Dieudruch Emmanuel's brother. (DK 176-193). The officer did not see any evidence of drugs at the barber shop. On November 7<sup>th</sup>, after the drug deal which he provided security for, the agent saw Dieudruch Emmanuel meet with Richard Artur in the parking lot near the barber shop, but saw no evidence of illegality.

Drug Enforcement Agent Heather Lyons testified as an intelligence research specialist. (DK 176-195). She assisted agents in collecting and analyzing information in the case. She subpoenaed phone companies for specific phone numbers, and provided the results to the case agent. In this case, she assisted the agents in obtaining cell phone subscriber records. (DK 176-198). She subpoenaed records concerning Emmanuel's wife, T'keyah McMath. The Government introduced a Certified Marriage Certificate exhibiting that Dieudruch Emmanuel and T'keyah McMath were married. (DK 176-200) [Exhibit 2]. Agent Lyons

subpoenaed records with respect to T'keyah McMath's cell phone. The phone number was 561-396-3840. (DK 176-203). She also asked for subscriber information and toll records for Dieudruch Emmanuel and Richard Artur. Those records were likewise introduced into evidence. [Government Exhibit 4]. Phone records for 724-413-3835 and 412-812-3238 were identified. The numbers had no subscriber information and were characterized by law enforcement as pre-paid "burner" phones. Via the analyst, the Government introduced a chart summarizing the information received regarding subscriber information and the requested numbers. (DK 176-210). [Exhibit 5]. According to the analyst, the chart tracked calls from the phones prior to the wiretap, during the wiretap, and post wiretap. (DK 176-212).

The analyst testified that three phone numbers were believed to be used by Dieudruch Emmanuel. During the four month period in which records were requested, there were over 10,000 records. (DK 176-214). Via the analyst, the Government introduced a chart of calling activity between Dieudruch Emmanuel and his wife, T'keyah McMath. (DK 176-215) [Government Exhibit 7]. The chart broke down the number of calls and texts between specific phone numbers. The witness highlighted calls between Richard Artur and Ms. McMath via phone. (DK 176-224). On cross examination, the analyst admitted that she did not collect any evidence establishing that Dieudruch Emmanuel used any of the phone numbers

she referred to. (DK 176-228-229). Law enforcement did not seize any of the phones. The analyst could not establish who purchased the phones, and was unable to establish who was actually on the phone calls when calls were made or received. (DK 176-231-232).

Agent Henry Remos with the Palm Beach County Sheriff's Office testified concerning his involvement in the case. (DK 177-7). He was cross-designated with the United States Postal Inspection Service as a Task Force Officer. Agent Remos testified that during the course of his career, he purchased drugs from drug dealers approximately 150 times, and was familiar with the street names and street level prices for certain drugs. (DK 177-10). Agent Remos testified that informants are routinely used in narcotics cases. The agent testified that it is common for informants to have multiple felony convictions. (DK 177-12). According to the agent, in general, heroin is "brown" and in 2019, Fentanyl was "white."

Agent Remos' role in the investigation was to sign up a confidential informant and work with agents from PBSO and DEA. The informant used in this case had been arrested earlier when he sold Undercover Agent Remos pure Fentanyl. After his arrest, the informant agreed to cooperate with law enforcement. As a result of his cooperation, he ended up being released on bond and ultimately getting sentenced to probation. (DK 177-172). Mack worked with law enforcement until the end of 2020. Further, he worked for DEA, which paid him tax free funds.

Mack had a criminal history which included nine felony convictions. The agent testified that the informant's nine felony convictions were narcotics related, although one was a firearm related offense. Mack was signed on as an informant and provided with a recording device for this case. (DK 177-20). He was supposed to record all of the conversations he had with any suspects in this investigation. Mack was working off his own charges in exchange for cooperation with law enforcement, and getting paid by DEA for acting as an informant.

Agent Remos testified that when they began their investigation, they were targeting a person nicknamed "Chewby." (DK 177-22). The first controlled purchase of heroin by Mack from Chewby was on June 4, 2019. Mack dialed 724-413-3834 and a male voice answered. (DK 177-30). The June 4<sup>th</sup> deal involved a small amount of heroin, \$100 dollars' worth. Agent Remos and Mack were instructed to meet at a location. Mack was the passenger. He exited Remos' vehicle and engaged in the hand to hand transaction with another individual. He was approximately 25 years of age and 6 feet tall. That person was not Dieudruch Emmanuel. (DK 177-34). The person was ultimately determined to be Max Durfille. No one was arrested as a result of the exchange. No direct connection between Dieudruch Emmanuel and Durfille was established.

Agent Remos testified that law enforcement attached a surreptitious video camera to the informant for every incident except the first one of June 4 2019. (DK

177-177). The agent admitted that he never observed, surveilled, or taped Dieudruch Emmanuel delivering anything to Richard Artur or *via versa*.

Agent Remos alleged that the next narcotics transaction occurred on June 7, 2019. (DK 177-39). This time, Agent Remos met with the informant and told him to purchase \$300 worth of heroin. Mack contacted the same number, and the same male voice answered. As a result of the conversation, Agent Remos drove Mack to the instructed area. After arriving at the location, Mack received a call from an unknown individual whose number was 786-200-7102, who said he would be arriving soon on bicycle. Max Durfille arrived on a bike, met with the informant, and completed a hand to hand transaction. (DK 177-41). Then, Max Durfille rode his bicycle back to 1870 Violet Avenue, West Palm Beach, FL. The agent was familiar with the location because surveillance had been set up on that location and it was believed that narcotics would come in and out of the residence. Max Durfille, Richard Artur and Dieudruch Emmanuel were seen at that location at various times. (DK 177-42). No one was arrested for the June 7, 2019 deal at the time.

The next controlled purchase of heroin was alleged to have occurred on June 13, 2019. (DK 177-45. This time, according to the agent, the confidential informant requested \$1100 worth of heroin. The deal was arranged through phone number 724-413-3835. The same male voice answered when Mack called. The

exchange took place in the area of 820 Sky Pine Lane in West Palm Beach, FL. Agent Remos saw a black Cadillac pull up next to the informant. The informant entered the rear passenger seat. He was wearing a listening device and Agent Remos monitored the conversation. The meeting took approximately four minutes. After the meeting, the informant met with the agents and turned over a clear baggie that contained a white and brown substance believed to be heroin. No one was arrested at the time. Law enforcement classified the case at that point as an “ongoing investigation.” (DK 177-49).

On June 25, 2019, surveillance was again conducted by members of the PBSO and DEA. Surveillance started at Grandiforra Drive, the billing address for Ms. McMath. The agents traveled to 1870 Violet Avenue in West Palm Beach, FL, less than 10 minutes away. (DK 177-52). There, Agent Remos observed Dieudruch Emmanuel enter the driver’s seat of a white Hyundai Genesis that started at Grandiforra Drive and drove directly to 1870 Violet Avenue.

On June 27<sup>th</sup>, law enforcement surreptitiously installed a camera that was able to view 1870 Violet Avenue via live stream. While watching, the agent became familiar with Richard Artur’s vehicle, a silver Kia that frequented the residence and stayed there overnight a lot. He also became familiar with Dieudruch Emmanuel’s Hyundai Genesis. The vehicle was owned by Ms. McMath and Mildred Smith.

The agent viewed a video of a meeting at the barber shop on November 7<sup>th</sup>. The Genesis was there on November 7<sup>th</sup>. Later, a car tracker was installed on Richard Artur's vehicle. (DK 177-58).

Agent Remos testified that at some point, law enforcement lost contact with telephone number 724-413-3835. It was no longer active and working. In response, the agent instructed Mack to try to get back in contact with someone from the drug trafficking organization. He was sent to 1870 Violet Avenue to make contact with individuals there. Once there, Mack made contact with Richard Artur. (DK 177-60). He provided a phone number, 561-388-3458. Law enforcement set up a narcotics transaction with Richard Artur and the informant. On July 30, 2019, Mack informed Richard Artur that he wanted to purchase a half ounce of heroin. The call was recorded.

There were five recorded calls between Mack and Richard Artur. Sixteen calls were recorded between Mack and Dieudruch Emmanuel. (DK 177-63). Law enforcement intercepted 92 wire calls, which included text messages. The Government tendered as Exhibits all of the calls and transcripts. (DK 177-64). The Government introduced several tape recordings and typed written transcripts thereof into evidence. The Court instructed the Jury regarding use of the transcripts. (DK 177-78-79).

Agent Remos identified Dieudruch Emmanuel to the Jury based upon his voice. (DK 177-80). From that, an in-court identification was made. The Government introduced recordings of the controlled calls from July 30, 2019. (DK 177-83). Agent Remos was questioned further concerning the calls and text messages. (DK 177-86). Richard Artur's texts, using an alias "X," were admitted into evidence. The agent provided his interpretation of the calls. Similar transactions occurred on August 1, 2019 between the informant and Richard Artur. This time, Mack purchased approximately 13.5 grams of heroin from Richard Artur. (DK 177-94).

Agent Remos testified that on August 8, 2019, they were attempting to introduce an undercover agent into the mix under the rouse that he was Mack's uncle. (DK 177-96). He wanted to purchase an ounce of heroin for \$2200. Agent Feaman played the role of the CI's uncle.

The deal was \$2200 for an ounce of heroin. The deal was scheduled to take place on Violet Avenue, at Richard Artur's residence. The agent was undercover, doing the deal without the informant present. Again, the agent saw Richard Artur's silver Kia backed up in the driveway. Richard Artur got in the agent's undercover Cadillac Escalade, and the agent gave Richard Artur the money in exchange for the drugs. Unc was provided with an ounce of heroin. They discussed the potential of engaging in future transactions. The heroin was placed into evidence. The

transaction was captured on video, but not introduced into evidence. (DK 178-113).

Agent Feaman texted with Richard Artur on August 8, 2019, when he met with Richard Artur. (DK 178-105) Several days after the agent engaged in the drug deal with Richard Artur, he received a text from Richard Artur confirming that the undercover agent wanted to purchase another ounce of heroin.

On August 13, 2019, the informant received a phone call from phone number 412-812-3238, which was a number believed to be associated with Dieudruch Emmanuel. During the call, the agent believed that Dieudruch Emmanuel stated it did not matter if the informant went to him to purchase narcotics or X (Richard Artur). (DK 177-98). According to the agent, Dieudruch Emmanuel would not meet the uncle, undercover Agent Feaman; he would only deal with Mack. (DK 177-105).

On August 15, 2019, the agent received a text from Richard Artur. Another deal had been scheduled. The next day, Richard Artur texted him in the morning. The agent responded that he was going to Orlando to get money and would be ready to make the purchase by Sunday or Monday. (DK 178-109). Thereafter, the agent complained about the potency and the price of the heroin to Richard Artur. The agent was stalling, as the agent was waiting for money from DEA to come in so he could engage in the next drug transaction. (DK 178-110).

Agent Remos testified that on August 20, 2019, there was a narcotics transaction between Agent Feaman and Richard Artur for an ounce of heroin. (DK 177-106). Dieudruch Emmanuel was not present, and argued that he was uninvolved in the drug deal. On August 22, 2019, the informant contacted what he believed was Dieudruch Emmanuel's new phone number. He advised that he wanted to purchase a half ounce of heroin. The informant was utilized for this buy, and not Agent Feaman, because Dieudruch Emmanuel stated he would not meet with the uncle. (DK 177-106). The informant contacted Dieudruch Emmanuel and was directed to go meet X. The transaction took place with Richard Artur.

The following day, on August 23, 2019, the phone believed to be used by Dieudruch Emmanuel texted Mack to assure that the transaction had gone well. Mack affirmed that it had. (DK 177-112).

Agent Remos testified that law enforcement lost contact with Dieudruch Emmanuel in early September, 2019. According to the agent, Dieudruch Emmanuel "kept switching his telephone numbers." (DK 177-122).

On September 9, 2019, Richard Artur texted Mack, allegedly to check on the quality of the narcotics from the August 22<sup>nd</sup> transaction. On September 12, 2019, Agent Remos met with Mack who contacted Richard Artur and advised Richard Artur that he wanted to purchase an ounce of heroin. The informant spoke with an unknown male individual at phone number 561-225-5196. He was told this is his

new phone number. Mack met with Richard Artur on September 12, 2019. \$2200 was exchanged for an ounce of white and brown heroin. (DK 177-121).

On September 28, 2019, there was a text message exchange between Dieudruch Emmanuel and Mack. Mack told Dieudruch Emmanuel that “Unc” was in the Bahamas and unavailable.

On October 22, 2019, Mack called the number believed to belong to Dieudruch Emmanuel to discuss future drug transactions. The next transaction was going to be for 5 ounces of heroin. Calls ensued between Mack and Richard Artur and Mack and Dieudruch Emmanuel.

Agent Remos testified concerning the wiretap interceptions of phone number 561-225-5196. (DK 177-142). Recordings from the wiretap intercepts were introduced. (DK 177-142). The agent testified that a wiretap was not initiated on Dieudruch Emmanuel’s phone as in law enforcement’s opinion, he switched phone lines “too quick for us to get up on a wire.” (DK 177-143). The agents intended to use Richard Artur’s phone to develop enough probable cause to “spin up on” Dieudruch Emmanuel’s phone number. (DK 177-143). The agent testified that “Mr. Emmanuel was always the primary target of this investigation.”<sup>3</sup>

On November 6, 2019, law enforcement’s plan was for the informant and the uncle, Agent Feaman, to meet with Richard Artur and Dieudruch Emmanuel

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<sup>3</sup> The wiretap authorization was for Richard Artur’s phone number only.

for the Government to obtain a free sample of what was to be a later five ounce heroin purchase. (DK 177-157). The informant was given a free sample of the five ounces of heroin. (DK 177-164). The meeting was recorded and videotaped. Ultimately, Dieudruch Emmanuel did not go to the meeting with Agent Feaman. Instead, the informant and Dieudruch Emmanuel exchanged messages.

The Government alleged that Dieudruch Emmanuel told Richard Artur that the product he had the undercover agent did not want and suggested mixing it to make it a lighter color, i.e., better quality. Dieudruch Emmanuel suspected that law enforcement was monitoring he and Richard Artur. (DK 178-127). Dieudruch Emmanuel asked a lot of questions concerning the undercover officer, but Richard Artur vouched for him. (DK 178-30). Dieudruch Emmanuel asked Richard Artur to go with him to drop off the sample. Richard Artur did not want to be seen by the uncle because it might cause the deal to fall through. The Government introduced texts, calls, and a videotape of the meeting between the informant, Dieudruch Emmanuel and Richard Artur on November 6, 2019. (DK 178-33). Various phone calls, texts and audios pertaining to the November 7, 2019 communications were introduced into evidence. According to the agent, Dieudruch Emmanuel set the price for the transaction. (DK 178-41) According to the undercover agent, Mack told him Emmanuel agreed to reduce the price to \$1800 per ounce for five ounces.

Following the drug transaction, Richard Artur called Dieudruch Emmanuel and arranged to meet with him.

On November 7, 2019, law enforcement made an undercover drug buy. The uncle was supposed to buy five ounces of heroin from Dieudruch Emmanuel. Agent Feaman was provided with \$10,000 to purchase the drugs. (DK 178-128). The upfront money was provided by DEA. The deal was to take place at the Violet Avenue residence. The agent and informant were both present for the deal. The informant got out of the undercover car and got inside another vehicle. There were three people inside the car; Richard Artur was one of the people. The informant came back to the undercover vehicle thereafter. After the informant returned to the agent's vehicle, Richard Artur got in and apologized for the quality of the drugs that he had previously provided. Thereafter, they engaged in the 5 ounce drug transaction. The agent had a scale, and weighed the heroin. It was approximately five ounces. (DK 178-131). The heroin was admitted into evidence. The agent gave Richard Artur the money, which Richard Artur counted and then exited the vehicle. The deal was recorded on a device inside the vehicle and a videotape of the transaction made.

On November 8, 2019, Agent Feaman, still in an undercover capacity, reached out to Richard Artur. They ended up meeting that day at Twin Peaks Restaurant in West Palm Beach, FL. The agent arrived first. They had arranged for

five ounces of heroin to be provided for \$9000. The agent provided \$10,000 and \$1000 was to be returned. This meeting likewise was recorded and a video of the meeting with Richard Artur was introduced. The agent testified that based upon his conversations with Richard Artur, he knew that Dieudruch Emmanuel was his brother at that time. (DK 178-140).

DEA Special Agent Abraham Reyes testified concerning his experience in wiretap cases both domestically and abroad. (DK 177-186). He became involved in the investigation into Dieudruch Emmanuel and Richard Artur and received an authorization for wiretap interceptions on Richard Artur's phone. The wiretap in this case became active on October 28, 2019. The wire went down when Richard Artur stopped using his cell phone on November 8, 2019. During that time, the agent was working in the wire room. (DK 177-194).

Agent Reyes testified that on November 7, 2019, he saw Richard Artur's vehicle leave his residence on Violet Avenue via the live video steam. The vehicle went to 1316 Olive Tree Circle. During that time, communications were coming from a phone thought to be utilized by Dieudruch Emmanuel. There were also a series of text messages exchanged. Subsequently, Richard Artur was seen leaving his residence. (DK 177-204). Calls were placed and intercepted pursuant to the wiretap, and the audio tapes were introduced into evidence. The agent testified that during the eleven days that the wire was up, or at least the eight that the agent

worked, he became familiar with Dieudruch Emmanuel and Richard Artur's voices. (DK 177-206). Based upon his voice, an in court identification of Dieudruch Emmanuel was made. (DK 177-206-207). The agent likewise identified Dieudruch Emmanuel's voice as being the one speaking to Mrs. McMath, his wife.

Agent Reyes ran the wire room and was a supervising agent. (DK 177-210). On cross-examination, the agent admitted that no cell tower triangulation connected Dieudruch Emmanuel and Richard Artur. However, the agents had a free-standing camera at Richard Artur's home. (DK 177-209). The agent saw Dieudruch Emmanuel, from time to time, on surveillance.

Agent Remos was re-called to the stand. The Prosecutor inquired concerning the November 6, 2019 transaction where the informant obtained a sample of heroin. (DK 177-215). The agent testified that he was at the November 6, 2019 transaction when the informant obtained the sample of heroin. (DK 177-217). The sample weighed approximately three grams and, because it looked pure white, the agent believed it was Fentanyl<sup>4</sup>. (DK 177-317). The informant was wearing a hidden video camera and was equipped with a two-way listening device. The agent did not actually see who handed the drugs to the informant. (DK 177-219).

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<sup>4</sup> In actuality, Government Exhibit 91 weighed approximately two grams of a mixture and substance containing heroin.

Palm Beach Sheriff's Officer Rey Paniagua, on assignment with DEA, and cross designated, testified as to his involvement in the case. (DK 177-227). The agent testified that he listened to the calls captured on the wiretaps. As a result of listening to thousands of calls, the agent became familiar with the coded language that drug dealers use. The agent was accepted by the Court as an expert in narcotics and street level drug trafficking, without objection. (DK 177-231).

The agent was permitted to testify and provide his opinion concerning the recorded calls between the informant and Defendants, Dieudruch Emmanuel and Richard Artur. (DK 177-235). Through the agent, the Government played several calls and introduced several text messages between Dieudruch Emmanuel and the informant, and Dieudruch Emmanuel to/from Richard Artur. The Government introduced a text wherein the Government believed Dieudruch Emmanuel was alleged to instruct Richard Artur to set a deal up with Unc. (DK 177-244). Calls were also introduced wherein Dieudruch Emmanuel and Richard Artur were discussing Richard Artur adding Fentanyl to his heroin for the sample to increase its quality. (DK 177-236).

On October 31, 2019, the agent was conducting surveillance in the wire room. Since he was the undercover, he couldn't do surveillance in the field. Instead, in the wire room he was watching a live feed of surveillance cameras in the area. The camera had a clear shot of Richard Artur's home. At one point,

Dieudruch Emmanuel was seen walking out of Richard Artur's residence. He entered a white Hyundai and departed the area. No illegal activity was observed.

The Court colloqued Dieudruch Emmanuel concerning his right to testify. Dieudruch Emmanuel decided that it was his personal decision not to testify. The defense renewed it's objection to the phone calls coming in. The defense relied upon it's written Motion in Limine which had been previously denied by the Court. The defense contended that the husband/wife privilege should apply and that the evidence was more prejudicial than probative. The issue had been fully briefed and after a hearing, the Court issued it's Order and saw no reason to reconsider it. The Judge again ruled the calls between husband and wife admissible. (DK 179-14).

Finally, the Government introduced Exhibits 147 and 148 and published the same to the Jury. They were excerpts of a recorded phone call from the Palm Beach County Jail on June 23, 2022, to a phone number utilized by T'keyah McMath. The Government introduced the jail call as Exhibit 148 and the accompanying Stipulation as Exhibit 147. (DK 179-13). In essence, Emmanuel told his wife he was thinking about pleading guilty because he'd seen the evidence they had against him and it was "really bad." The defense objected to a dismissal of the jail calls, arguing that the marital privilege should apply as more fully argued in the pre-trial motion hearing. (DK 179-13). The Court ruled that the calls were allowed into evidence based upon Emmanuel's consent to the recording of

the calls from the jail. (DK 179-14). The defense objections were renewed prior to being introduced as evidence. (DK 179-18). The call was published to the Jury and the Government rested it's case. The defense informed the Court that the defense would rest. (DK 179-20).

The Court read a curative instruction prepared by the defense, without objection. (DK 179-19). After the husband to wife call was played, the Government rested it's case. (DK 179-20). The defense likewise rested.

The Court instructed the Jury. (DK 179-21). The standard 11<sup>th</sup> Circuit Conspiracy Instruction was given. (DK 179-26-27). "A conspiracy is an agreement by two or more persons to commit an unlawful act." (DK 179-37).

As to Count I, Conspiracy to Possess with Intent to Distribute 100 Grams or More of Heroin, the Jury was told that Dieudruch Emmanuel was not charged in Count I with committing a substantive offense, he was charged with conspiring to commit the offense with either Richard Artur and/or other individuals known and unknown to the Grand Jury. The Instruction for Conspiracy was read to the Jury without objection. (DK 179-27).

The Government gave it's closing argument. (DK 179-37). The Government argued that Dieudruch Emmanuel planned to share in the profits and now "must share in the consequences." (DK 179-37). During it's closing, the Government replayed the calls from Dieudruch Emmanuel to his wife from the Palm Beach

County Jail. (DK 179-45). The Prosecutor characterized the calls as “devastating” to the defense (DK 179-45).

The Government argued that Dieudruch Emmanuel entered into an agreement with Max Durfille, then with his brother, and with other individuals known or unknown, to commit the drug crimes. The Government argued that there were other people involved in the conspiracy and that Dieudruch Emmanuel engaged in a conspiracy with Max Durfille “and obviously with Richard Artur,” (DK 179-47).

The Government argued that Dieudruch Emmanuel tried to keep his identity a secret while his underlings performed the drug deals “while he sat back and counted the money.” (DK 179-37-38). The Government argued that Dieudruch Emmanuel used code words, and sometimes switched to speaking in Creole. (DK 179-38). The Government argued that Dieudruch Emmanuel used multiple phone numbers, and utilized burner phones that were not subscribed to his name, “a typical tactic for drug dealers.” (*Id.*)

The defense argued that there was reasonable doubt and that Dieudruch Emmanuel was presumed not guilty. (DK 179-56). The defense argued that the informant was the director and boss of what occurred in the case. (DK 179-57). Dieudruch Emmanuel never entered into a drug deal with anyone. The defense argued that the only purported customer was the informant and that one cannot

conspire with a Government agent. The defense countered the Government's claim that Dieudruch Emmanuel engaged in a conspiracy.

### **REASONS FOR GRANTING THE WRIT**

A Writ of Certiorari should issue in this to review the federal constitutional question raised herein. Pursuant to Rule 10, S.Ct.R., compelling reasons support certiorari review at bar. Because of the following issues:

- I. Whether the marital privilege warrants limiting the wife's testimony under extraordinary circumstances when failure to do so will allow highly prejudicial evidence of limited probative value?

Certiorari should be granted in this case.

### **ARGUMENT**

- I. **THE DISTRICT COURT REVERSIBLY ERRED BY ALLOWING THE GOVERNMENT TO INTRODUCE PRIVILEGED TELEPHONE RECORDINGS BETWEEN DIEUDRUCH EMMANUEL AND HIS WIFE**

Dieudruch Emmanuel contends that error occurred when the District Judge denied his Motion in Limine seeking to prohibit the Government from introducing evidence of telephone conferences between Dieudruch Emmanuel and his wife, T'keyah McMath, at the trial. He contends that the admission of the evidence violated the marital confidential communications privilege. Further, the evidence, under the circumstances, could not survive a prejudice versus probative inquiry. Finally, he maintained that where the Prosecutor stated "ladies and gentlemen, I

submit to you that they are not just bad [phone calls], they are devastating, devastating [to the defense]. They provide proof not just beyond a reasonable doubt, but beyond all doubt of what the Petitioner was engaged in during the course of this conspiracy," the evidence was highly prejudicial. (DK 179-45). As the evidence was, in the Prosecutor's words, "devasting," the allowance of the improper evidence prejudiced Dieudruch Emmanuel and violated his rights to a fair trial and meaningful adversarial proceedings.

In Florida, [t]he only privileges recognized under Florida law are those established by the Florida Evidence Code, any other statute, the Federal or Florida Constitutions, and the Florida Supreme Court pursuant to its rule making authority. Thus, with the exception of rules adopted by the Florida Supreme Court, "privileges in Florida are no longer creatures of judicial decision." *Guerrier v. State*, 811 So. 2d 852, 854 (Fla. 5th DCA 2002) (citations omitted); see also Section 90.501, Fla.Stat. (2020).

In this case, even if a privilege existed in the common law, the Florida Evidence Code is the sole source of the husband-wife privilege, and the text of the statute governs. See *Hill v. State*, 846 So. 2d 1208, 1212 (Fla. 5th DCA 2003) (footnotes omitted) ("In Florida, the marital communication privilege, although originally created by the common law, is a creature of statute. It is presently included as part of the Evidence Code. The Florida State courts accept

the statute, as modified from time to time, as the sole source of the privilege.").

*McDermott v. State*, 360 So. 3d 1213, 1216 (Fla. 5th DCA 2023).

It has been recognized that the husband-wife privilege consists of two components. The first bars a spouse from testifying against the other spouse; the second bars a spouse from testifying regarding confidential communications made by the other spouse. See *United States v. Mendoza*, 574 F.2d 1373, 1379 (5th Cir. 1978). Both components involve testimonial aspects. *State v. Grady*, 811 So. 2d 829, 831(Fla 2nd DCA 2022).

During the Covid 19 pandemic, Emmanuel was arrested and subsequently indicted for various narcotics offenses. During that time he was denied communication with any individual except his lawyer, without the conversation being recorded. Normally, a prisoner is allowed in person visitation with full spousal confidentiality in what is spoken and communicated. Here, in light of the pandemic, no in person visits were being scheduled, conducted, or allowed and the only means possible through which to communicate was over a recorded telephone line. Although no record was made of the exact language, at the beginning of every call from Emmanuel to his wife, they were told that the call originated from a corrections facility and was being recorded.

The husband-wife privilege statute, provides in part:

Section 90.504, Fla.Stat.

(1) A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.

(2) The privilege may be claimed by either spouse or by the guardian or conservator of a spouse. The authority of a spouse, or guardian or conservator of a spouse, to claim the privilege is presumed in the absence of contrary evidence.

(3) There is no privilege under this section:

(a) In a proceeding brought by or on behalf of one spouse against the other spouse.

(b) In a criminal proceeding in which one spouse is charged with a crime committed at any time against the person or property of the other spouse, or the person or property of a child of either.

(c) In a criminal proceeding in which the communication is offered in evidence by a defendant-spouse who is one of the spouses between whom the communication was made.

The District Judge in this case relied on cases where the defendant consented to being recorded in holding that the defendant had no expectation of privacy because of the disclaimer on the recording. (DK 175-4) While that may have been true under normal circumstances, because of the pandemic which constituted extraordinary circumstances, confidentiality, in any form, was made impossible.

Simply put, even though Emmanuel wanted to have a confidential communication with his wife, he was unable to do so because all calls were on a recorded line. As anticipated, the Government capitalized on the impact of the calls, terming the husband-wife jail calls as “devastating.” At the least, the evidence should have been prohibited as the probative value was far outweighed by the danger of unfair prejudice under Rule 403, F.R.E.

Here, Emmanuel's statements to his wife were made. Emmanuel does not contest that. However what actually occurred could not be properly termed "consent" to being recorded. In a situation such as this, a defendant is often viewed as having impliedly consented. See *United States v. Christiansen*, 2019 US Dist. LEXIS 6167 (CD ILL. 2019). Here, that was not enough to overcome the marital privilege and extreme prejudicial admission of the evidence caused.

In analyzing this issue, the Court must first consider the landscape of marital communications during the time period these conversations occurred. Federal prisoners pre-trial detained in the Palm Beach County Jail during COVID were unable to have personal contact with their spouses. Their only contact was through recorded phone lines or recorded video visitation. Nevertheless, the defendant and his wife discussed personal legal decisions including a consideration of his guilt and desire to enter into a plea agreement with the Government over a recorded line.

The Government argued below that notice was given before each call from an inmate that the calls were monitored and recorded. Having no alternative, Dieudruch Emmanuel and his wife engaged in confidential communications over a recorded line. They had no other way to attempt to communicate because of the extraordinary circumstances of the Pandemic. Admission of these communications so skewed the case in the Government's favor that Dieudruch Emmanuel could not prevail and could not mount a meaningful defense. The Court erred in allowing the

evidence and in finding that it's probative value outweighed it's prejudicial effect under Rule 403, Fed.R.Evid. and the marital privilege under Rule 501, Fed.R.Evid.

The Appellant understands that under certain circumstances, a privilege can be waived by voluntary disclosure. See Rule 507, Fed.R.Evid. Under Florida law, specifically Section 90.504, Fla.Stat., “[A] spouse had a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.” *Kleiman v. Wright*, 2021 U.S. Dist. LEXIS 40195 (S.D. Fla. 2020). “For a privilege to apply, spouses must have a ‘reasonable expectation of privacy’ in the communication in question.” *Lamport v. Williams*, 2014 W.L. 1260514 at \*3 (S.D. Fla. June 3, 2014). Here, the Court should have not permitted the evidence based upon the marital privilege and to prevent extreme prejudice.

The law is well settled that a witness has a privilege to refuse to testify against her spouse, who was a defendant in a criminal proceeding. A spouse cannot foreclose the other from testifying against him. See *Trammel v. United States*, 445 U.S. 40 (1980).

The marital communications privilege excludes information privately disclosed between husband and wife in the confidence of the marital relationship. *Trammel*, 445 U.S. at 51. The privilege generally applies only to utterances, not

acts. *Pereira v. United States*, 347 U.S. 1, 6 (1954). It also does not apply to conversations between husband and wife about crimes in which they are jointly participating in. *United States v. Entrekin*, 624 F.2d 597, 598 (5<sup>th</sup> Cir. 1980). Here, it is undisputed that Emmanuel's wife was not charged with any crime.

The Court heard argument from both sides concerning spousal testimonial privilege and marital confidential communications. The Government argued that the spousal testimonial privilege was inapplicable in this case. (DK 175-11) The Prosecutor argued that the privilege only applied where a spouse was compelled to testify against her husband and the Government was not calling Dieudruch Emmanuel's wife as a witness. They were introducing the "jail call" as evidence in their case-in-chief.

The Government contended that the marital confidential communications privilege did not apply because the communications were not private and the participants in the calls knew they were not private. They were calls coming from a jail with an audible warning that they were recorded. (DK 175-12). After the warning, Ms. McMath was required to press a number on her keypad to confirm that she consented to the recording of the call. The defense responded that the only way Dieudruch Emmanuel could have any private conversations with his wife was over the taped line, which he argued was improper. (DK 175-15). If not improper on its face, at the very least the evidence was highly prejudicial with little or no

probative value. To allow the same to be used by the Government to convict violates public policy.

The Government also argued that the conversation with his wife was Dieudruch Emmanuel's expression of his willing to plead guilty, which is evidence of consciousness of guilt, which is admissible at trial. See *United States v. Majia*, 655 F.3d 126 (2<sup>nd</sup> Cir. 2011); Rule 410, Fed.R.Evid.

With regards to the defense argument that the prejudicial effect of the conversations outweighed their probative value, the Court stated that the Petitioner intended to put forth a defense of identity concerning the 4000 calls between August and November, 2019, and his distinctive voice. The defense argued that there was no distinctive voice. (DK 175-16-18). The defense argued that the Jury would learn that Dieudruch Emmanuel was in custody, which it argued was extremely prejudicial. Lastly, the defense argued that the conversations were not admissions of guilt, "they are simply conversations." The defense contended that they were more like plea discussions with one's spouse and should be deemed inadmissible. (DK 175-19).

Conversations such as that had here, between a husband and wife, should remain confidential despite a recorded message informing them that all calls are recorded. Public policy should encourage that type of communication, as it shows

the wife and husband conferring on an important family decision – whether to plead or not.

Certiorari review is warranted.

## **CONCLUSION**

Based upon the foregoing grounds and authority, the Appellant, Dieudruch Emmanuel, respectfully requests this Honorable Court enter an Order reversing and remanded for a new trial or re-sentencing, together with such other action as this Court deems necessary.

Respectfully submitted,

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