

No. _____

**In The
Supreme Court of the United States**

_____ Δ _____

SANDRA FINCH

Petitioner,

_____ Δ _____

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

_____ Δ _____

PETITION FOR WRIT OF CERTIORARI

_____ Δ _____

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QUESTION(s) PRESENTED:

I. Whether a District Court may use the inherent power to penalize the exercise of a Fifth Amendment privilege?

II. Whether Petitioner received the process due to her under the Fifth Amendment to the Federal Constitution where she was denied adequate notice of the orders to testify sufficient to comply, object and/or prepare a meaningful defense; denied notice of the specific conduct being sanctioned and type of sanctions being sought sufficient to prepare a defense; denied any hearing on attorney fee sanctions which in turn deprived her of any right to take testimony on attorney fees, confront the attorney's fees or to rebut them, or challenge the nexus of the conduct complained of with the topic of the law journal?

III. Does the Court of Appeals' misapplication of a *de novo* finding of waiver, which was never raised in the trial Court or in any appellate brief, invoke this Court's duty of supervision of the federal judiciary?

LIST OF PARTIES

The name of the Petitioner is:

Sandra Finch

The name of the Respondents are:

None

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sandra Finch respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for The Eleventh Circuit is unreported but may be found at 2017 WL 2992071. (App. 4a)

The December 6, 2016 Order of the United States District Court for the Northern District of Georgia sanctioning Petitioner for the exercise of her Fifth Amendment Constitutional privilege against self-incrimination by Ordering her to write an article to be submitted for publication is unreported and available at 2016 WL 7093903. (App. 113a)

The December 21, 2016 Order Ordering Petitioner to pay attorney fees as a sanction for exercising her Fifth Amendment Constitutional privilege against self-incrimination is unreported and available at 2016 WL 7383770. (App. 127a)

The July 1, 2016 Order of the United States District Court, which orders Petitioner to testify against herself without due process, is unreported and available at 2016 WL 4123838. (App. 13a)

The July 6, 2016 Order of the United States District Court, which overrules Plaintiff's due process objections to the Court's July 1, 2016 Order and orders her to comply without notice, is unreported and can be found on the District Court Docket as Doc. 127. (App. 22a)

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's two-part order sanctioning Petitioner for the exercise of her privilege against self-incrimination was entered on July 14, 2017; and its order denying Petitioner's timely filed Petition for Rehearing was entered on September 13, 2017.

This Petition For Writ of Certiorari is filed within ninety (90) days of the date of the Court of Appeals' denial of Petitioner's timely filed Petition for Rehearing. 28 U.S.C. Section 2101(c); Revised Supreme Court Rule 13.3.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

The underlying case is a diversity case which requires the application of state substantive law.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS IMPLICATED BY THIS PETITION

U.S. Const. Amend. 5:

No person shall...be deprived of life, liberty, or property without due process of law...

"Nor shall any person be compelled in any criminal case to be a witness against himself".

Ga. Const. of 1983, Art. I, Sec. I, Par. XVI:

"no person shall be compelled to give testimony tending in any manner to be self-incriminating".

O.C.G.A. § 24-5-505:

"No party or witness shall be required to testify as to any matter which may incriminate or tend to incriminate such party or witness or which shall tend to bring infamy, disgrace, or public contempt upon such party or witness or any member of such party or witness's family.

STATEMENT OF THE CASE

The Petitioner is an attorney who was preparing for a Jury trial which was to commence on July 11, 2016.

On July 1, 2016 at 3:45 p.m. on the Friday before the Fourth of July holiday weekend the District Court ordered Petitioner:

[t]o file on or before July 5, 2016, a sworn affidavit stating, in detail, how and under what circumstances Petitioner obtained the photographs of Mr. Gould's business office and the Steamatic Guide in question, including when the photographs were obtained, who took them, where they were taken, to whom they were distributed, whether the Steamatic Guide photographs had Petitioner's letterhead and, if so, how did the letterhead appear on them, and whether Petitioner was involved in or knew the circumstances regarding the creation of the photographs.

App. 13a. With Monday being a holiday, the order provided insufficient notice to Petitioner to prepare a defense or to obtain counsel.¹ *Id.* In addition the Order was vague as to the legal basis for the Order sufficient to formulate a defense.

On Tuesday July 5, 2016 before the deadline to comply, Petitioner filed objections which included lack of notice, due process and opportunity to be heard, and mootness. App. 17a.

On July 6, 2016, while Petitioner was on a plane traveling to a hearing in the case, the Court issued a second order, overruling the objections, and ordering compliance by 5:00 p.m. same day. App. 20a. Petitioner did not receive the second order until it was too late to comply, depriving her of both substantive and procedural due process. App. 26a.

At a pretrial conference on July 7, 2016, which was a hearing scheduled even before Petitioner had failed to comply for purposes of trial and was not a hearing noticed for the purpose of hearing the issue of non-compliance of the court's orders, the District Court

¹ Monday July 4th was a federal holiday.

inquired into the status of the affidavit. *Id.* Petitioner stated she did not receive notice in time to comply. App. 26a. The Court asked if Petitioner wanted more time to comply. App. 26-27a. Petitioner replied: *“I would like some additional time to respond.”* *Id.* The Court stated *“if you are saying that you need additional time to respond, I will give that to you”* and *“if you need a little more time to do that, I’m willing to do that”*. App. 28-29a.

However, the Court did not give Petitioner more time. Instead, that same day the District Court issued an Order to Show Cause why Petitioner should not be held in contempt, ordering Petitioner to appear July 11, 2016 5:30 p.m.—first day of jury trial—for a contempt hearing, with only 4 days’ notice. App. 34a. In its order, the Court stated:

Plaintiff’s counsel did not request additional time to file the affidavit. Plaintiff’s counsel did not file the required affidavit, and has not otherwise responded to the Court’s July 6th Order requiring the affidavit.

Id.

A contempt hearing was held on July 11, 2016 at 5:30 p.m. immediately after the first day of jury trial. App. 36a. At the contempt hearing Petitioner raised several objections including lack of notice, lack of due process, right to counsel, lack of willfulness, inability to comply, lack of a clear and valid order, attorney work product / investigative privilege and 5th Amendment privilege. App. 43a-53a. Though not expressly stated, the district court conceded to the validity of Petitioner’s due process objections by agreeing to continue the contempt hearing to allow Petitioner time to prepare defenses and to obtain counsel stating *“if you want to submit something in writing now that I have given you my views on this, I will hold off issuing a written order until you do.”* App. 58a. The Court also stated *“if you want an additional hearing with counsel, I am happy to schedule that.”* *Id.* Thus, the District Court extended the time for Petitioner to raise

additional defenses and to obtain counsel and her objections were not untimely.

Notice of Settlement of the underlying litigation was filed on July 18, 2016. App. 61a. The Court ordered Petitioner to appear on August 23, 2016 to resume contempt proceedings. App. 62a. A “Stipulated Plaintiff’s Voluntary Dismissal **With Prejudice**” was filed on August 18, 2016, dismissing all claims and parties, ending the underlying litigation. App. 64a.

Petitioner retained Bruce Harvey as her counsel. Thereafter, the Court held a pretrial conference with Petitioner and invited counsel to submit written authority on the contours of contempt power.² Petitioner submitted a memorandum of law as requested by the District Court again raising the issues of due process, lack of notice, work product investigation privilege, Fifth Amendment privilege in defense of non-compliance. App. 72-79a.

On October 26, 2016 the District Court issued an order finding that contempt was not possible in light of Petitioner’s valid exercise of her Fifth Amendment privilege stating as follows:

“The Court does not—nor could it—now require Respondent to forego her asserted Fifth Amendment rights by requiring her to comply with the Court’s July 1st and July 6th Orders.”

App. 88a. Notwithstanding the court’s finding of legal excuse for non-compliance, in the same October 26, 2016 order, the court ordered Petitioner to appear for a sanctions hearing for the same non-compliance that was the subject of the contempt proceeding. *Id.* The Court’s order did not include notice that attorney fees would be considered at the sanctions hearing. *Id.* Thus, Petitioner had no notice to prepare a defense on attorney fees. *Id.* Nor was the issue of attorney fees raised at the November 29, 2016 sanctions hearing. App. 89a-110a.

² The court allowed additional written objections to the contempt proceedings.

Petitioner raised another due process defense at the sanctions hearing due to the vagueness of the Court's October 26, 2016 order which failed to specify which Orders Petitioner had violated. App. 93a, 109a. Petitioner also reiterated her previous Fifth Amendment defenses. App. 99a.

After the November 29, 2016 sanctions hearing, the Court issued two orders. The first dated December 6, 2016 required Petitioner to write an article for publication and ordered Allstate (dismissed party who settled with prejudice) to produce its attorney fee invoices to the Court. App. 113a. The second order, dated December 21, 2016, ordered Petitioner to pay \$1,538.00 of Allstate's attorney fees by January 6, 2017. App. 127. Petitioner had no opportunity to be heard on attorney fees or to defend the attorney fee sanction in any way.

Petitioner timely appealed the District Court's December 6th and 21st orders to the Eleventh Circuit Court of Appeals and submitted her Appellate Brief on March 29, 2017. Petitioner cited to the District Court's finding of a validly asserted Fifth Amendment privilege in defense to contempt for failure to comply with the orders as evidence of a good faith basis for assertion of the privilege in defense of sanctions under the inherent power for the same non-compliance—in other words finding the privilege was validly asserted for contempt means that the privilege is also a valid defense to sanctions under the inherent power and also negates a finding of bad faith, which is necessary to sanction under the inherent power. Petitioner also argued no due process was afforded to her on either of the July 2016 Orders to testify due to lack of notice. Petitioner's Appellate Brief was the only brief submitted and was unopposed. The issue of waiver was never raised by anyone in the district court or in any appellate brief.

On July 14, 2017, the Eleventh Circuit Court of Appeals affirmed the District Court's Orders on grounds never before raised in the District Court or in any

appellate brief—finding that Petitioner waived her Fifth Amendment privilege by failing to object or comply to the District Court’s orders to testify, notwithstanding that lack of due process prevented such objections/defenses and notwithstanding the District Court’s grant of an extension of time to raise defenses. App. 3a. The Court of Appeals did not address any of the due process issues raised by Petitioner which included lack of notice of both of the July 2016 Orders, which prevented timely objection or compliance, and in awarding attorney fee sanctions with no notice or opportunity to be heard on the attorney fees.

Petitioner filed a Petition for Rehearing En Banc or Rehearing on August 3, 2017, raising due process objections to the Court of Appeals deciding the case on a never before raised issue and arguing that the Appellate Court’s finding of waiver and bad faith were in direct contradiction to United States Supreme Court precedent that there shall be no penalty for the exercise of the Fifth Amendment privilege and that the privilege cannot be waived involuntarily or by silence. The Eleventh Circuit Court of Appeals denied rehearing without any opinion.

A bar grievance has been filed against Petitioner by the Georgia State bar seeking to sanction Petitioner’s failure to comply with the District Court’s Orders to testify against herself on grounds of Georgia Rule of Professional conduct Rule 3.5 alleging that her failure to testify against herself is “conduct intended to disrupt a tribunal. The State Bar is relying upon the District Court’s Orders sanctioning Petitioner as grounds to discipline Petitioner. Therefore, not only is Petitioner being deprived of property without due process, her ability to earn a living is also in jeopardy.

REASONS WHY CERT SHOULD BE GRANTED

A. SUMMARY OF ARGUMENT

The District Court denied Petitioner both procedural and substantive due process in issuing its coercive orders to testify and in its imposition of sanctions against Petitioner. Neither of the two July 2016 Orders to testify provided sufficient notice to allow Petitioner to object, prepare a defense, obtain counsel, or to timely comply. The first gave one business day notice over a holiday weekend. The second order was not received until after the time to comply had already expired.

At Petitioner's first opportunity to be heard, which was the initial contempt hearing held 4 days ³ after the show cause order for contempt was issued, Petitioner raised due process and Fifth Amendment objections and remained silent in the face of the orders to testify. The District Court's sanctions of Petitioner for refusing to testify on grounds of Fifth Amendment privilege against self-incrimination conflict with established Supreme Court precedent which prohibit penalizing an attorney for the good faith exercise of a Fifth Amendment privilege. Good faith assertion of the privilege is supported by the District Court's finding that Petitioner validly raised the privilege in defense of contempt proceedings related to the same orders. If the trial Court found the privilege validly asserted in defense of contempt, this negates a finding of bad faith non-compliance of the same orders under the inherent power.

Finally, in affirming the District Court's Orders based upon its *de novo* finding of waiver—an issue never before raised or briefed, the Eleventh Circuit Court of Appeals has so departed from the accepted and usual course of judicial proceedings so as to justify the supervisory power of the Supreme Court. The District Court's sanctions are

³ Two of the four days were weekend days.

against the logic of the circumstances and unreasonable. The Supreme Court is Petitioner's last safeguard against the District Court's abusive orders and given that the State Bar is relying upon the District Court's clearly erroneous rulings, her career is in jeopardy.

B. APPLICABLE STANDARD OF REVIEW

The District Court's entry of sanctions under the inherent power is reviewed for an abuse of discretion. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991). "An abuse of discretion occurs when the district court applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner... or ignores or misunderstands the relevant evidence." *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 16-11896, 2017 WL 1046103, at *3, ---F.3d --- (11th Cir. Mar. 20, 2017); see also *Koon v. United States*, 518 U.S. 81, 100 (1996).

C. ARGUMENT

I. A federal court cannot compel self-incrimination testimony nor can it assess a penalty for the good faith exercise of the privilege against self-incrimination.

a. No penalty shall be suffered for the exercise of the Fifth Amendment privilege.

The two orders at issue in this appeal compel Petitioner to testify against herself and all sanctions stem from failing to comply with orders aimed at punishing Petitioner for failing to comply with said orders.

The United States Constitution provides that no person "shall...be compelled in any criminal case to be a witness against himself". U.S. Const. Amend. 5. The privilege extends to protect any individual from being compelled to answer official questions put to him in any ... proceeding, civil or criminal, formal or informal,

administrative, investigative, or adjudicatory where the answers might incriminate him in future criminal proceedings. *Maness v. Meyers*, 419 U.S. 449, 464 (1975); *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). It applies not only to evidence which may directly support a criminal conviction, but to information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a future proceeding.” *Manness*, at 461, 95 S.Ct. at 592.

The Supreme Court prohibits not only direct compulsion but also “practices that are coercive in that they make the exercise of the privilege “costly.” *Id.* (citing *Spevack v. Klein*, 385 U.S. 511, 515 (1967) (holding that the Fifth Amendment privilege against self-incrimination guarantees the right “to suffer no penalty for...silence”).

In addition, Georgia's Constitution provides even broader protection of the privilege, stating that “no person shall be compelled to give testimony tending in any manner to be self-incriminating”. Ga. Const. of 1983, Art. I, Sec. I, Par. XVI; *Green v. State*, 260 Ga. 625, 627, 398 S.E. 2d 360 (1990). Georgia statutory law provides additional protection against self-incrimination as follows:

No party or witness shall be required to testify as to any matter which may incriminate or tend to incriminate such party or witness or which shall tend to bring infamy, disgrace, or public contempt upon such party or witness or any member of such party or witness's family.

OCGA § 24-5-505. It is long standing precedent that federal district courts must apply state substantive law in diversity cases. See *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). This broader privilege against self-incrimination under Georgia’s constitution and statutory law is a substantive

right afforded to Petitioner which must be protected and enforced.

This Court has held that where compliance with an order would require the irretrievable surrender of constitutional guarantees, it is proper to violate the order and contest its validity on appeal. See *Maness v. Meyers*, 419 U.S. 449 (1975)(holding a witness may refuse to comply with a trial court's order to testify and seek appellate review because an appellate court cannot “unring the bell” and completely cure any error).

In the instant case there is no question that had Petitioner complied with the request to provide an affidavit, she would have waived her constitutional privilege against self-incrimination. Therefore, it was Petitioner's right to remain silent and challenge the validity of the orders on appeal, which she has done.

In addition, the District Court found that Petitioner validly invoked her Fifth Amendment privilege in defense of contempt proceedings for violating the same two orders. App. at 88a. Allowing the District Court to simply change procedures to punish Petitioner for non-compliance of the same orders under the inherent power would render the privilege meaningless. *Spevack* makes clear that any penalty, regardless of the procedure used, is an unconstitutional penalty. Therefore, this Court should reverse and dismiss the sanctions imposed against Petitioner by the District Court.

- b. The District Court's factual finding that Petitioner raised a valid Fifth Amendment privilege defense for non-compliance with the orders to testify on contempt allegations negates bad faith precluding sanctions under the inherent power.

The Supreme Court held that “[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion.” *Chambers at 4* (due process must be observed in exercising the inherent power to

sanction). The burden to establish sanctions under the inherent power is very high. *Id.* at 47. The threshold inquiry for imposing sanctions is a finding of bad faith. *Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001). "[B]efore a court can impose sanctions against a lawyer using its inherent power, it must find that the lawyer's conduct constituted or was tantamount to bad faith." *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1320 (11th Cir. 2002). Bad faith must be proven by clear and convincing evidence. *Crowe v. Smith*, 261 F.3d 558, 563 (5th Cir. 2001). This is especially applicable to non-contempt monetary sanctions imposed on attorneys *sua sponte* by the court as demonstrated by *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 570 (3rd Cir. 1985) and *Cendant Corp. v. Forbes*, 260 F.3d 183, 200 (3rd Cir. 2001). There are a plethora of cases holding that any legitimate grounds for a defense cannot be bad faith. See *Davis v. Goodson*, 459 U.S. 1154 (1983) and *Spevack* holding that assertion of the Fifth Amendment privilege is not bad faith where there is an honest belief the privilege exists.

At the contempt hearing, Petitioner, in good faith, unequivocally invoked her privilege against self-incrimination, which is protected by the federal Constitution and by a combination of Georgia Constitutional and statutory law. App. at 53a. Declining to hold Petitioner in contempt, the District court found the privilege legally excused Petitioner's non-compliance stating:

"The Court does not-nor could it-now require Respondent to forego her asserted Fifth Amendment rights by requiring her to comply with the Court's July 1st and July 6th Orders".

App. 88a.

The District Court's finding in this case that Petitioner's privilege defense excused contempt is conclusive evidence of a good faith basis for asserting the privilege. It is difficult to argue that Petitioner's

privilege defense was made in bad faith where even the District Court agreed it was a valid defense to contempt. Even the Court of Appeals did not find that Petitioner's assertion of the privilege was baseless.

II. The Proceedings Below Sanctioning Petitioner Without Notice and Opportunity to Be Heard Violated Due Process

The Petitioner submits that the proceedings in District Court by which she was assessed sanctions deprived her of the process due her under the Fifth Amendment to the Federal Constitution in the following ways: she was denied adequate notice of the orders sufficient to enable her to timely comply, object and/or prepare a meaningful defense; she was denied notice of the specific conduct being sanctioned; she was denied notice of the type of sanctions being sought sufficient to prepare a defense; she was denied any hearing on attorney fee and law journal sanctions which in turn deprived her of any right to take testimony on attorney fees, confront the attorney's fees or to rebut them, or challenge the nexus of the conduct complained of with the topic of the law journal.

This Court has required the federal judiciary to provide certain basic procedural protections whenever it deprives a litigant of a valuable right. *Armstrong v. Manzo*, 380 U.S. 545, 552, (1965); *Mathews v. Eldridge*, 424 U.S. 319, 334-335, (1976). *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the government's asserted interest, "including the function involved" and the calculus then contemplates a judicious balancing of concerns through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any of additional or substitute procedural safeguards." *Id.*; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-529 (2004), Employing the

Mathews calculus to the instant case, the process due Petitioner before she could be forced to testify or sanctioned for any presumed noncompliance with an order to testify consists, at a minimum, of: 1) sufficient notice of the proposed action and the grounds asserted for it in time to do some good; 2) an opportunity for some kind of formal hearing where the testimony is recorded for purpose of appellate review and where you can present evidence to rebut any adverse allegations against you; 3) an impartial and unbiased tribunal; and 4) a decision based upon the record together with a statement of the reasons for the decision. *Cleveland Bd. Of Educ. V. Loudermill*, 470 U.S. 532, 538 (1985); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 269-271 (1970); *In re Murchison*, 349 U.S. 133, 136 (1955); *Hamdi* at 533 citing *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972).

a. The Petitioner's Property Interest

The starting point in defining the Petitioner's rights is identifying the Petitioner's property or liberty interest at risk in these proceedings. Under the due process clause of the Fifth Amendment, the Petitioners would be entitled to procedural due process if the property/liberty interest at stake is deemed to be of such magnitude or importance that its loss can fairly be characterized as important; and it depends upon the extent to which the individual will be "condemned to suffer grievous loss." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972) quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *Goldberg* at 262-263 (1970).

The monetary sanctions of \$1,548.00 imposed against Petitioner constitute a final, lasting deprivation of property entitling her to the protection of the Federal due process clause. *Los Angeles v. David*, 538 U.S. 715, 717 (2003) (deprivation of money is the deprivation of property for purpose of evaluating due process

protection). *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538; 541 (1985) (“the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures”)(emphasis supplied).

Beyond the monetary sanctions, the Court’s sanctions have implicated Petitioner in an unjust bar complaint directly jeopardizing her property right to the continued practice of law. In this respect, the monetary sanction goes beyond the dollar amount and acts “as a symbolic statement about the quality and integrity of an attorney’s work—a statement which may have tangible effect upon the attorney’s career....” *Simmerman v. Corino*, 27 F.3d 58, 64 (3rd Cir. 1994). The stigmatic effect of this sanction upon the Petitioner’s legal practice directly affects her right to pursue a livelihood, a property right deserving of due process protection. *Loudermill*, 470 U.S. at 538; *Barry v. Barchi*, 443 U.S. 55, 69-70 (1979)(Brennan, J., concurring in part); *Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972).

b. What process was due to the Petitioner?

Once it is determined that the Due Process Clause applies to the proceedings below, “the question remains what process is due.” *Loudermill*, 470 U.S. at 541 quoting *Morrissey v. Brewer*, 408 U.S. at 481. The procedures to be employed should be “tailored to the capacities and circumstances of those who are to be heard.” *Goldberg* at 268-269; see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (sanctions should not be assessed lightly or without fair notice and an opportunity for a hearing on the record); *Rogal v. American Broad. Cos.*, 74 F.3d 40, 44 (3d Cir.1996); *Eash* 570 (3rd Cir. 1985).

In selecting the appropriate sanctions for attorney misconduct, courts should “deploy[] the least extreme sanction reasonably calculated to achieve the appropriate punitive and deterrent purposes”. *Byrne*, at 1132; see

also *Natural Gas Pipeline Co. Am. V. Energy Gathering, Inc.*, 86 F.3d 464, 467-468 (5th Cir. 1996) (holding that, in imposing attorney sanctions pursuant to inherent powers, courts must use the least severe sanction necessary to achieve the desired goals; observing that “the ultimate touchstone of inherent powers is necessity”. The sanction must be narrowly tailored to address the sanctionable conduct. See *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir.1995) (citing *Chambers and Byrne* at 1106).

The District Court sanctioned Petitioner, without opportunity to be heard, by *sua sponte* ordering her to pay \$1,548.00 in attorney fees to a Defendant that had agreed to a settlement and dismissal of all claims with prejudice. The District Court, also without opportunity to be heard, *sua sponte* sanctioned Petitioner by ordering her to write a law journal on the consequences of failing to be candid with the court.

Petitioner submits that the process due her consists of the following below elements:

A. Adequate Notice. "Imposition of a monetary sanction by [a] district court without affording the attorney prior notice and an opportunity to be heard violates due process." *Chambers* at 44. The Petitioner was entitled to notice of the hearing on sanctions in the District Court which was reasonably calculated, under all the circumstances, to apprise her of the precise nature of the proceeding. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950). The notice was required to be of a kind which would reasonably and fairly convey to her the required information so that she could appear and respond effectively with objections in whatever form was allowed. *Id. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14(1978).

Such notice necessarily requires, at minimum, notice of the specific conduct being sanctioned, the legal basis for the sanctions and the type of sanctions contemplated

by the Court.⁴ If the sanction is for attorney fees, it is the burden of the party moving for sanctions (in this case the court) to show exactly how much attorney fees, in hours, that it views was caused by the sanctionable conduct, and the failure to do so is fatal. *Gray v. Lockheed Aeronautical Sys. Co.*, 125 F.3d 1387 (11th Cir. 1997).

Notice is important because defenses depend upon the type of sanctions contemplated. See *Chambers*. For example, as explained below, with attorney fee sanctions, one must know the specific fees to be used as the basis for sanctions in order to defend against each fee. Without advance notice of specific fees contemplated, it is impossible to prepare a defense.

B. A Full Evidentiary Hearing On Contested Fact Issues. Equally important is the right to be heard to challenge and/or cross examine sanctions to be assessed. If there is no opportunity to be heard then defenses cannot be raised at all.

In the instant case, Petitioner likely had several defenses which she could have raised had she been given notice and opportunity to be heard on the sanctions issued including but not limited to res judicata, sanctions not tailored to the conduct being sanctioned, etc.⁵

Whether or not the specific attorney fees assessed against Petitioner were tied to the sanctionable conduct is a question of fact. Similarly, whether a sanction to publish an article on the consequences of failing to be candid with the court is tailored to a factual situation where Petitioner was silent is also an issue of fact. Fact

⁴ *Chambers* at 55; *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1307 (2006); *Campos v. City of Naples*, 202 Fed. Appx. 381 (11th Cir. 2006).

⁵ Res judicata would bar an award of attorney fees in favor of Allstate because the parties settled and dismissed the case with prejudice. *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 121 S.Ct. 1021 (2001).

questions cannot be resolved by just oral argument or by requiring that the parties submit their respective positions only “on the papers.” Instead, “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses.” *Goldberg* at 269-270 citing *ICC v. Louisville & N. R. Co.*, 227 U.S. 88,93-94 (1913) and *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104(1963); see also *Arnett* at 142-146.

The cases provide that the District Court was required to notice Petitioner the type of sanctions it was seeking, especially if it was for attorney fees, along with the reasons why, and give Petitioner an opportunity to be heard.⁶ The Petitioner was denied the process due to her by the Fifth Amendment when the District Court awarded attorney fees without notice and without a fair hearing. Likewise, Petitioner was denied due process on the sanction of writing an article on a subject not tied to the conduct being sanctioned.

C. A Fair And Impartial Tribunal. Due process requires a neutral and detached judge in the first instance. *Hamdi* at 533 quoting *Ward* at 61-62; *Withrow* at 46-47; *Arnett* at 197; *Goldberg* at 271; *In re Murchison* at 136 (1955). While the District Judge is more than a mere umpire---in fact, he is the governor of the proceedings before him—he cannot become an advocate or otherwise use his judicial powers to advantage or disadvantage a party unfairly. *Quercia v. United States*, 289 U.S. 466, 470 (1933). Nor “should [he] give vent to personal spleen or respond to a personal grievance.” *Offutt v. United States*, 348 U.S. 11, 14 (1954). See 28 U.S.C. Sections 455(a) and (b)(1). A judge should

⁶ *Chambers* at 55; *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1307 (2006); *Campos v. City of Naples*, 202 Fed. Appx. 381 (11th Cir. 2006).

disqualify himself in a proceeding in which his partiality might reasonably be questioned, including but not limited to instances where he has a personal bias or prejudice concerning a party. 28 U.S.C. Sections 455(a) and (b)(1).

The District Judge in this case has demonstrated overwhelming bias against Petitioner and her client in the proceedings below and during this Appeal. For example during the trial, Judge Duffey frequently yelled at Petitioner in open court, was mean and malicious, told Petitioner she did know how to read in open court, objected for the defense during trial on numerous occasions, cross examined Plaintiff's witnesses on behalf of the defense in such a manner which created an impression of bias in front of the jury, raised legal issues on behalf of the defense throughout the litigation, allowed Defense to raise new defenses in the pretrial order that were never raised in the Answer or disclosed in discovery, ignored law that favored Plaintiff, made several statements that inferred that Plaintiff's case was a waste of his courtroom, and even invited the Defense to move for a mistrial which he then granted over Plaintiff's objections. The way the Judge has issued Orders in the case on holiday weekends with little notice and denying a stay of the judgment pending appeal demonstrates extreme bias and malicious intent. Even when presented with overwhelming evidence that Defense witness Mark Gould committed perjury and denied Plaintiff a thorough cross examination by walking out of a trial deposition, Judge Duffey denied Plaintiff's Motion In Limine ruling that Plaintiff had "no right to cross examination" of a witness against her at trial. Instead, Judge Duffy chose to go on a vendetta against Petitioner to discover where impeaching documents were obtained

when the law is clear that the source of documents is not relevant to admissibility.⁷

For all of the aforementioned reasons, the proceedings below sanctioning Petitioner violated the due process guaranteed her by the Fifth Amendment to the Federal Constitution.

III. The Court of Appeals' de novo finding of waiver is legal error invoking this Court's power of superintendence of the Federal Courts.

The District Court declined to hold Petitioner in contempt after finding that Petitioner validly exercised her Fifth Amendment privilege as a defense stating: "*The Court does not-nor could it-now require Respondent to forego her asserted Fifth Amendment rights by requiring her to comply with the Court's July 1st and July 6th Orders*". App. at 88a. Waiver was never raised in the District Court or in any appellate brief. Waiver was raised for the first time in the Eleventh Circuit's Order affirming the District Court's sanctions, with a de novo finding that Petitioner failed to timely invoke her

⁷ The Courts have been quite clear that "when papers are offered in evidence the court can take no notice of how they were obtained, whether lawfully or unlawfully, nor would they form a collateral issue to determine that question." *Adams v. New York*, 192 U.S. 585, 595 (1904). Even evidence obtained by theft or other illegal means is admissible. *Burdeau v. McDowell*, 1256 U.S. 465 (1921); see also *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, 32 F.2d 195, 202 (2d Cir. 1929) and *Hernandez v. Brookdale Mills*, 201 App.Div. 325, 194 N.Y.S. 283 (1922); For example, in *Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354 (1954), the Court refused to apply the exclusionary rule to bar the use of illegally obtained evidence to impeach the credibility of the defendant. The 4th Amendment only applies to governmental action and thus the exclusionary rule does not apply where evidence is obtained by a private person. *Barnes v. United States*, 373 F.2d 517, 518 (5th Cir. 1967).

privilege, irrespective of her due process objections which prevented any objections before the deadline for compliance. App. 8a.

A district court's ruling that a position is factually well grounded and legally tenable is fact specific and subject to an abuse of discretion standard of review. *Cooter & Gell v. Harmarx Corp.*, 496 U.S. 384 (1990). Finding that Petitioner waived her Fifth Amendment privilege is legal error because it conflicts with the District Court's factual finding that Petitioner validly asserted the privilege and the Eleventh Circuit made no finding of an abuse of discretion with respect to the District Court's finding that Petitioner had validly invoked her privilege.⁸ Further, it violates the rule that new issues not raised in the lower court or in opening briefs are not to be considered by the Appellate Court. *Pullman-Standard v Swint*, 456 U.S. 273, 292 (1983); see also *United States v. Ardley*, 273 F.3d 991, 991-95 (11th Cir.2001) (Carnes, J., opining issues raised in district court or in appellate briefs will not be considered on appeal). It is a fundamental violation of due process because deciding the case on a never before raised issue completely deprives Petitioner of any opportunity to be heard on the issue.

- a. There is a heavy presumption against waiver through silence, especially where due process is not afforded.

The Eleventh Circuit made no finding that Petitioner's assertion of privilege against self-incrimination was frivolous, nor has it found Petitioner does not have the privilege. Instead, the three judge panel said that the privilege was untimely asserted and

⁸ *In re DG Acquisition Corp.*, 151 F.3d 75 (2nd Cir. 1998). (Applied this rule refusing to reverse district court's factual finding of no waiver of the Fifth Amendment privilege where no abuse of discretion shown to justify reversal).

waived in a situation where the record is clear that Petitioner did not have sufficient notice of either order at issue and was deprived of a reasonable opportunity to make any objection before the District Court issued its Order to show cause for contempt. This is fundamentally unfair and does not comport with notions of due process. See *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (II) (1973) ("fundamental fairness is the touchstone of due process"). Finding waiver under these facts conflicts with the Supreme Court's holding in *Chambers* that due process is critical to the use of the inherent power to sanction. *Chambers* at 47.

Notwithstanding the due process obstacles to finding of waiver contrary to the fact finding of the trial court, there is no authority for finding waiver of the privilege against self-incrimination where one remains silent without ever offering any incriminating statement. The Georgia Supreme Court holds that waiver must be voluntary and will not be presumed by silence. *State v. Cooper*, 281 Ga. 63, 636 S.E.2d 493 (2006). Silence is defined as "restraint from speaking". Blacks Law Dictionary 1416 (8th ed. 2004). It is "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence". *Spevack*. The privilege guards against "the imposition of any sanction which makes the assertion of the Fifth Amendment privilege costly". *Id.*

The Supreme Court has made clear that waiver of the privilege against self-incrimination is disfavored holding that "waiver of constitutional rights is not lightly to be inferred" and that the courts are to "indulge every reasonable presumption against finding a testimonial waiver." *Emspak v. U.S.*, 349 U.S. 190, 198 (1955); see also *U.S. v. Hung Thein Ly*, 646 F.3d 1307 (11th Cir. 2011) ("courts to indulge every reasonable presumption against waiver of fundamental constitutional rights"). The *Emspak* Court held that "silence is necessarily ambiguous, and equivocal waivers of Fifth Amendment

rights are ineffective." *Emspak* at 195-197. Thus the presumption against waiver is especially heavy when the purported waiver has occurred through non-assertion or inaction (i.e. silence). See e.g. *U.S. v. A & P Arora, Ltd.*, 46 F.3d 1152 (10th Cir. 1995) (rejecting waiver by non-assertion holding "the privilege has a unique, constitutional grounding which counsels caution in the application of technical waiver principles"). In addition, the Georgia Supreme Court has stated that a refusal to talk (remaining silent) can invoke the privilege and specifically rejected the argument that a refusal to talk can never invoke the privilege. *State v. Nash*, 279 Ga. 646, 619 S.E.2d 684 (2005). Further, there is no limit to the number of times one can invoke the privilege-one can invoke it every time the government tries to force testimony through whatever means. *Huskins v. State*, 294 Ga. App. 653, 669 S.E.2d 680 (2008) (even express waiver does not prevent later invoking of privilege). So Petitioner was entitled to invoke the Fifth Amendment privilege every time the District Court took any coercive action to try to force her to comply.

The Eleventh Circuit improperly relied upon *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136 (1984) which is distinguishable from the instant case because *Murphy*, a criminal defendant, voluntarily gave incriminating statements and then afterwards raised his Fifth Amendment privilege in an effort to exclude the statements. Unlike *Murphy*, Petitioner has not volunteered any statement in response to the two orders compelling her testimony. *Murphy* is, therefore, inapplicable to the facts of this case.

The Federal and Georgia cases finding waiver in the context of silence or inaction have involved facts similar to *Murphy*, which usually involve an attempt to remain silent (either ambiguous or express) followed by the giving of incriminating statements and a later attempt to invoke the privilege to exclude the statements from evidence. Those cases are distinguished from the instant

case, where Petitioner remained silent, invoked her privilege at her first opportunity and never gave any statement in response to the court orders compelling her to testify.

Because this is a diversity case, the District Court and the Eleventh Circuit was required to apply Georgia's state substantive law on the Fifth Amendment privilege against self-incrimination and its holding directly conflicts with Georgia law that waiver must be voluntary and silence is not a waiver. Further, a finding of waiver for the first time at the appellate level, without ever giving Petitioner an opportunity to be heard on that issue, violates the rule that new issues not raised in the lower court or in opening briefs are not to be considered by the Appellate Court. *United States v. Ardley*, 273 F.3d 991, 991-95 (11th Cir. 2001). It is a fundamental violation of due process because deciding the case on a never before raised issue completely deprives Petitioner of any opportunity to be heard on the issue.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit and, ultimately, to vacate the judgment for sanctions, and to enjoin the District Court from penalizing Petitioner for the exercise of her Constitutional Fifth Amendment privilege against self-incrimination; or to provide the Petitioner with such other relief as is fair and just in the circumstances.

Respectfully Submitted

 Date 12/11/17

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