

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 09-1443, *In re: David Ashenfelter*
Originating Case No. : 07-13842

Dear Counsel,

The petition for writ of mandamus has been docketed as case number **09-1443** with the caption listed above. If you have not already done so, you must mail a copy of the petition to the lower court judge and counsel for all the other parties.

Sincerely yours,

s/Sue Burlage
Case Manager
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Hours: 7:00 a.m. to 1:00 p.m.

cc: Mr. David J. Weaver

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IN THE
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREEN, Clerk

No. 09-1443

IN RE DAVID ASHENFELTER,

Petitioner.

RICHARD CONVERTINO,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

On Petition for Writ of
Mandamus to the
United States District
Court for the Eastern
District of Michigan,
Southern Division

Case No. 07-13842

Hon. Robert H. Cleland

**PETITION FOR WRIT OF MANDAMUS BY
NON-PARTY NEWS REPORTER DAVID ASHENFELTER**

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RELIEF REQUESTED

Petitioner David Ashenfelter respectfully petitions for a writ of mandamus that (1) stays all district court proceedings pending further order by this Court, and (2) upholds the First and Fifth Amendment privileges that Ashenfelter has asserted. Alternatively, Ashenfelter asks that this Court issue a writ directing the district court to issue a final order that resolves Ashenfelter's Fifth Amendment claims based on the information contained in the record, including his *ex parte* declaration, to quash the deposition now scheduled for April 21, 2009, and to stay pending any appeal any sanctions that might be imposed against Ashenfelter.

I. Introduction

This Petition involves the validity of First and Fifth Amendment protections asserted by Ashenfelter, a Pulitzer Prize-winning reporter for the *Detroit Free Press*. Ashenfelter has been subpoenaed as a non-party witness in a Privacy Act lawsuit filed against the United States by former Assistant U.S. Attorney Richard Convertino. The lawsuit claims that Department of Justice ("DOJ") employees "leaked" to Ashenfelter documents and information about its internal investigation into misconduct by Convertino, which Ashenfelter then reported on in a news article (the "Article"). Convertino alleges the disclosure harmed his reputation—even though, soon thereafter, the same investigation led a district judge to throw out terrorism-related convictions that Convertino had won, and deride the DOJ for

multiple prosecutorial abuses. In this proceeding, Convertino ultimately seeks to identify the confidential source(s) behind Ashenfelter's Article.

After motion practice relating to Ashenfelter's asserted First Amendment privilege, the district court ordered that Ashenfelter be deposed. Convertino deposed Ashenfelter on December 8, 2008. There, Ashenfelter asserted his First and Fifth Amendment privileges, and refused to answer any question other than his name. Convertino then sought to hold Ashenfelter in contempt. On February 11, 2009, the district court heard argument on the Fifth Amendment privilege.¹

In an Opinion and Order dated February 26, 2009, the district court imposed an impossible—and unheard-of—burden on Ashenfelter. It ruled that, in order to validly assert his Fifth Amendment rights, Ashenfelter would be required to submit to another deposition, and answer factual questions posed to him by Convertino's lawyer, after which the district court would determine if those facts gave rise to valid Fifth Amendment concerns. Such a procedure, unrecognized in the case law or logic, if validated, renders the Fifth Amendment a nullity—for how can one be protected by the Fifth Amendment, yet simultaneously be required to divulge all the "facts" that the Amendment protects in order to validly assert it?

Moreover, such disclosures cannot be remedied on appeal, because the "facts" underlying the assertion will be disclosed in the deposition and cannot be

¹ Additional First Amendment argument would have been futile. Ex A at 3 n.2.

“taken back.” This is especially true in this case, because the DOJ is a party to the case and may attend (or receive transcripts of) all depositions.² In addition, voluntarily agreeing to testify at a deposition in lieu of suffering a contempt raises serious questions of privilege waiver, which likewise cannot be “taken back.”

On March 6, Ashenfelter submitted to the district court a sealed declaration, *ex parte* and *in camera*, containing all relevant facts to which Ashenfelter would personally swear—something the district court had *invited*.³ The district court did nothing with the submission. So, on March 30, Ashenfelter moved the district court to rule on his privileges based on the record as supplemented by the invited declaration. A day later, the district court refused, reiterating that Ashenfelter must appear for a second deposition—*in the courthouse*, “[so] that the undersigned judge [could immediately] decide disputed objections.”⁴

Without mandamus relief, Ashenfelter’s only route to appellate review of the district court’s extraordinary and unconstitutional procedure is to force the district court to impose an unseemly and unnecessary contempt upon him, thereby risking immediate incarceration with no certainty that the district court will allow a stay pending appeal. Finally, to require Ashenfelter, his counsel, out-of-state counsel

² The DOJ deemed Ashenfelter’s December 8, 2008 deposition so important that it sent one lawyer to attend in person, and another participated by phone. The DOJ also sent two lawyers to the February 11, 2009 “contempt” hearing.

³ Ex B (D/E 53) at 1.

⁴ Ex C (D/E 59) at 1.

for Convertino and the DOJ, and the district court itself to sit through another deposition of Ashenfelter, just so he can again assert his First and Fifth Amendment privileges to invoke appellate review, is a needless, expensive, and time-consuming procedure. Petitioner asks for appellate review now.

II. Relevant Background

A. Ashenfelter's Article Revealed Public Corruption Involving Plaintiff

Ashenfelter is a long-time, Pulitzer Prize-winning reporter for the *Detroit Free Press*. In 2004, he learned from a confidential source or sources within the DOJ about its investigation of Plaintiff Richard Convertino, then an Assistant U.S. Attorney in Detroit. Potentially corrupt activity by those sworn to uphold the law is a matter of acute public interest, and reporting on such misconduct is a core mission of a free press. Ashenfelter properly reported this important information in the Article.⁵ *No one has denied its accuracy*—including Convertino.

Convertino had been the lead Assistant prosecuting the terrorism case *United States v. Koubriti*.⁶ Two defendants were convicted. But Convertino was removed from the case, and the DOJ's Office of Professional Responsibility ("OPR") launched an investigation into possible ethics violations by Convertino, in

⁵ Ex D.

⁶ Ex E ¶¶ 3-4.

Koubriti and another case. Ashenfelter's Article reported some of the details of this investigation, and noted that it could force a new trial in *Koubriti*.⁷

On February 13, 2004, Convertino sued the DOJ and others in the U.S. District Court for the District of Columbia under the Privacy Act, 5 U.S.C. § 552a, for making public the so-called "private" information about the DOJ investigation contained in the OPR Report. Exactly as the Article predicted, however, the OPR found that Convertino's prosecution team had withheld documents and evidence that allowed government witnesses to mislead the jury about the facts of the case. On September 2, 2004, Judge Gerald Rosen dismissed the charges, severely criticizing Convertino's prosecution team for "prevalent and pervasive" failures.⁸

B. Procedural History of This Collateral Proceeding

In May 2007, Convertino served Ashenfelter with a subpoena compelling his non-party deposition. On July 6, 2007, Convertino filed a motion in the Eastern District of Michigan to compel the deposition. On March 26, 2008 (after a stipulated stay), Ashenfelter filed his opposition, relying primarily on the qualified First Amendment Reporter's Privilege and Fed R. Evid. 501. On August 29, 2008, Judge Robert Cleland rejected Ashenfelter's arguments and granted the motion.

⁷ Ex D.

⁸ Ex F.

On November 7, the court denied Ashenfelter's motion for a protective order and remission,⁹ and on November 21 it denied a motion for reconsideration.

On December 8, 2008, Ashenfelter appeared for deposition. Convertino asked questions concerning Ashenfelter's confidential source(s), and to each, Ashenfelter asserted his Fifth Amendment privilege against self-incrimination (and preserved other privileges). On December 23, Convertino moved for contempt sanctions designed to coerce Ashenfelter to identify his source(s). On February 11, 2009, the district court heard arguments. On February 26, it denied the contempt motion without prejudice, and ordered Ashenfelter to appear again for deposition.

On March 6, at the district court's invitation, Ashenfelter requested leave to submit a declaration, *ex parte* and *in camera*, containing the extent of the information in support of his Fifth Amendment assertion to which Ashenfelter was willing to personally attest. The district court did nothing with this invited submission. Therefore, on March 30, Ashenfelter moved the district court to resolve Ashenfelter's Fifth Amendment claims based on the record as supplemented by the invited declaration, and either uphold the privilege or certify the issue for immediate appeal under 28 U.S.C. § 1292(b). On March 31, the district court inexplicably denied the motion, and reiterated its command that Ashenfelter appear *in court* for another deposition, now scheduled for April 21.

⁹ Remission, under Fed. R. Civ. P. 26, is the discretionary deference on discovery

III. Argument

A. Standard for Granting Writ of Mandamus

This Court considers five factors when evaluating a mandamus petition:

(1) the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error; (5) the district court's order raises new and important problems, or issues of first impression.¹⁰

B. Ashenfelter Faces the Hobson's Choice of Forfeiting His Privilege or Risking Incarceration, Neither of Which Can Be Cured on Appeal

Ashenfelter has already given the district court all the evidence he will give to support his assertion of the privilege against self-incrimination. If he were forced to testify at the deposition, he would (1) publicly reveal links in a chain of evidence that could lead to his prosecution, and/or (2) waive the very privilege he relies on. Ashenfelter accepted the district court's invitation to provide testimony *ex parte* and *in camera*, then asked the district court to either rule based on the record as supplemented by the invited declaration, or certify the issues for appeal under 28 U.S.C. § 1292(b). But the district court inexplicably refused, and has repeatedly ordered Ashenfelter to appear for deposition on April 21.

issues to the court in which the underlying action is pending.

¹⁰ *United States ex rel. Pogue v. Diabetes Treatment Ctrs of Am., Inc.*, 444 F.3d 462, 473 (6th Cir. 2006) (citations omitted).

At that on-the-record deposition, Ashenfelter will again be subject to any questions that Convertino's counsel may ask—including all of the questions that Ashenfelter has already declined to answer. The district court has not limited the subject matter. The district court—by denying Convertino's contempt motion without prejudice; by rejecting Ashenfelter's prior assertions of privilege for lack of facts personally attested to by Ashenfelter; and by scheduling the second deposition *in the courthouse* so that it can *immediately rule* on Ashenfelter's privilege claims based only on facts Ashenfelter personally attests to—has made clear that Ashenfelter may either capitulate, and testify as to facts that either incriminate himself, provide a link in the chain of evidence leading to a prosecution, possibly waive all of his privileges, or risk incarceration for contempt.

All of these options would be irreparable on appeal. Incarceration—which the district court's unprecedented and unwaveringly coercive rulings give Ashenfelter every reason to expect, once he is held in contempt—cannot be undone, and would be especially irreparable should either of Ashenfelter's constitutional privileges be vindicated on appeal.¹¹

¹¹ See, e.g., *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (unconstitutional confinement raises presumption of irreparable harm); *United States v. Bogle*, 855 F.2d 707, 710-711 (11th Cir. 1988) (“unnecessary deprivation of liberty clearly constitutes irreparable harm”); *Cobb v. Green*, 574 F. Supp. 256, 262 (W.D. Mich. 1983) (“There is no adequate remedy at law for a deprivation of one's physical liberty. Thus [it] . . . is substantial and irreparable.”).

Likewise, any testimony that Ashenfelter gives in this matter could very well be later held to constitute a waiver of the First or Fifth Amendment privileges as to the answer's entire subject matter. "It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details."¹² "Where a witness has voluntarily answered as to materially criminating facts, it is held with uniformity that he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate."¹³ "The law . . . does not permit a witness to open the door just wide enough to offer the Court an impaired view of the facts. Once the witness voluntarily opens the door, the Court may open it completely, and scrutinize every exposed matter."¹⁴

Put simply, "[d]isclosure of a fact waives the privilege as to details."¹⁵ "Thus, where an individual's subsequent testimony would only flesh out prior testimony, a waiver is likely to be found."¹⁶ A waiver may extend beyond what the witness intended to reveal, because "an individual may lose the benefit of the privilege without making a knowing and intelligent waiver."¹⁷ Ashenfelter can

¹² *Mitchell v. United States*, 526 U.S. 314, 321-22 (1999).

¹³ *Rogers v. United States*, 340 U.S. 367, 373-74 (1951).

¹⁴ *In re Mudd*, 95 B.R. 426, 430 (Bankr. N.D. Tex. 1989).

¹⁵ *Rogers*, 340 U.S. at 373.

¹⁶ *In re Blan*, 239 B.R. 385, 394 (Bankr. W.D. Ark. 1999).

¹⁷ *Minnesota v. Murphy*, 465 U.S. 420, 428 (1984).

neither predict nor control the extent to which any given court will later determine the extent to which his testimony could constitute waiver.

Therefore, “[t]he time for a witness to protect himself is when the decision is first presented to him.”¹⁸ If Ashenfelter testifies at all, he will have already run the risk of waiver by the time the district court enters a final order he can appeal. This Court could not undo the waiver.¹⁹

C. The District Court’s Interpretation of the Fifth Amendment Is Clearly Erroneous as a Matter of Law

1. Convertino’s Own Allegations Supply Evidence Supporting Ashenfelter’s Fifth Amendment Privilege

a. Convertino’s Privacy Act Complaint Alleges Crimes

Convertino’s complaint alleges that “DOJ . . . intentionally and/or willfully disclosed and/or made available to others the contents of records maintained in one or more Privacy Act systems of records pertaining to Plaintiff . . . in violation of the Privacy Act of 1974, as amended, 5 U.S.C. § 552a(b).”²⁰ Subsection (i)(1) of the same Act makes such activities punishable as a misdemeanor. The complaint also repeatedly characterizes the DOJ’s alleged release of information to Ashenfelter as a willful violation of a district court’s sealing order,²¹ as retaliation

¹⁸ *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (J. Learned Hand).

¹⁹ *See United States v. Phillip Morris*, 314 F.3d 612, 622 (D.C. Cir. 2003) (staying order because violation of privilege would be irreparable)

²⁰ Ex. G at ¶ 132.

²¹ *Id.* at ¶¶ 80, 82.

for the exercise of constitutionally protected speech,²² and as generally “illegal”²³ and “unlawful”²⁴ under “the Privacy Act . . . [and] other [federal] laws.”²⁵

Specifically, Convertino alleges that DOJ officials gave Ashenfelter confidential documents in violation of the Privacy Act, including “a complete and un-edited version of [the letter from DOJ officials referring the allegations against Convertino to the OPR]”²⁶ and “a copy of the December 2, 2003 OPR letter [to Convertino].”²⁷ According to the complaint, Ashenfelter’s publication of this information “directly harmed the United States’ ‘War on Terrorism’ . . . and placed the life of a confidential informant and his family in grave danger.”²⁸

b. The District Court Acknowledged the Potential Criminality of the Acts Convertino Alleges

In the July 6, 2006 motion to compel with which Convertino began these proceedings and in later filings, Convertino alleged that Ashenfelter’s source within the DOJ “has engaged in potentially criminal conduct”²⁹ by virtue of his alleged Privacy Act violation. Convertino made this argument in an effort to circumvent the qualified First Amendment privilege that Ashenfelter claimed.

²² *Id.* at ¶¶ 80-82.

²³ *Id.* at ¶¶ 84, 112, 122.

²⁴ *Id.* at ¶ 118.

²⁵ *Id.* at ¶ 122 (emphasis added).

²⁶ *Id.* at ¶ 112.

²⁷ *Id.* at ¶ 113.

²⁸ *Id.* at ¶ 125.

²⁹ D/E 1 at 5; D/E 25 (Reply Brief) at 18.

c. ***In Public Statements, Convertino Has Directly
Accused Ashenfelter of Criminal Acts***

For years, Convertino, on his fundraising website (convertino.org), has condemned Ashenfelter as a “criminal” who is conspiring with other “criminals” in the DOJ to tarnish Convertino’s reputation and cover up criminal actions by DOJ officials. For example, in one “story” published underneath the headline “Detroit News Reporter is Protecting Criminals,” Convertino writes³⁰ that “*David Ashenfelter of the Detroit Free Press helped Federal Prosecutors commit a crime, and is now aiding them by hiding their identities. The leak of information [Ashenfelter] published . . . was a criminal violation.*”³¹ After repeating the word “criminal” several more times, Convertino even asserts that Ashenfelter’s news story “aided the terrorists much more than any other leak has.”³²

Convertino is no mere lay plaintiff tossing epithets. He describes himself as “a highly-skilled, effective and experienced”³³ (former) federal prosecutor. One must assume that when such a person uses terms such as “criminal,” “aiding,” and “conspiracy,” he not only knows their meaning, but he intends to convey an informed legal belief as to their applicability to Ashenfelter.

³⁰ Convertino’s counsel (but not Convertino himself) has tried to pass the buck for this website onto Convertino’s wife, Valerie. Even if that distinction mattered, which it doesn’t, the site directs readers to contact Mrs. Convertino *at the offices of Convertino’s personal law firm*. Ex H (“Contact Us” from convertino.org).

³¹ Ex I (emphasis added).

³² *Id.*

2. **These Facts Reasonably Engender Fear of Prosecution**

At the February 11 hearing, a senior DOJ representative *admitted* the DOJ *could not rule out the possibility* of prosecuting Ashenfelter.³⁴ The Court needs no other basis for imagining the possibility that Ashenfelter could be prosecuted. At that hearing, Ashenfelter's counsel connected the facts known to the district court to several charges under which Ashenfelter fears prosecution.³⁵ In addition to conspiracy to violate the Privacy Act, the following charges could also be brought.

a. **Theft and Receipt of Government Information or Records**

Ashenfelter could be prosecuted under 18 U.S.C. § 641,³⁶ which governs the theft and receipt of "public money, property or records" (or a conspiracy to violate that statute, or as an aider, abettor, or accessory to such an offense). Officials have been prosecuted under this provision for giving government reports and information to the press.³⁷ The applicable limitations period is five years,³⁸ but would not yet have begun to run if Ashenfelter still possessed the documents.³⁹

³³ Ex G ¶ 11.

³⁴ Ex J (Transcript) at 43-46.

³⁵ Ashenfelter submits to this Court under seal the declaration that it submitted *in camera* to the district court. This provides additional support for the privilege.

³⁶ See also M.C.L. § 750.535 (analogous state crime).

³⁷ See *U.S. v. Morison*, 844 F.2d 1057 (4th Cir. 1988) (affirming conviction).

³⁸ 18 U.S.C. § 3282.

³⁹ See *U.S. v. Blizzard*, 812 F.Supp. 79 (E.D. Va. 1993), *aff'd*, 27 F.3d 100 (4th Cir. 1994).

b. Conspiracy

“If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under [18 U.S.C. § 371] or imprisoned . . .”⁴⁰ The scope of this statute is notoriously broad, to say the least. Therefore, even if an underlying crime was perpetrated by a government official, Ashenfelter could still be prosecuted for conspiring with that person.

Convertino alleges that Ashenfelter’s confidential source committed a crime (including by violating the Privacy Act) by giving information and documents to Ashenfelter. His allegations also suggest that Ashenfelter’s source(s) committed perjury or obstructed justice. The DOJ has already conducted a criminal investigation to identify Ashenfelter’s source, and everyone interviewed denied involvement. If it turned out that—as Convertino has insisted—one or more of those persons lied under oath, such persons could face perjury⁴¹ or false statement⁴² charges, and Ashenfelter might be investigated and prosecuted for subornation or obstruction in connection with such perjury or false statements.

⁴⁰ 18 U.S.C. § 371.

⁴¹ 18 U.S.C. §§ 1621 (perjury) & 1622 (subornation).

⁴² 18 U.S.C. § 1001 (punishing one who “knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact [or] makes any materially false, fictitious, or fraudulent statement or representation”). The punishment increases if, as Convertino alleges, “the offense involves international or domestic terrorism.” *Id.*

Federal law contains many other methods for punishing indirect criminal behavior. For example, aiding and abetting a federal offense is punishable under 18 U.S.C. § 2, while 18 U.S.C. § 3 criminalizes the actions of one who “receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.” Concealing another person’s commission of a felony, or “misprision,” is also a crime.⁴³ Any of these statutes could conceivably be used to prosecute Ashenfelter for any crime for which his source(s) may be prosecuted. Prosecutors have been known to be creative in “stretching” criminal statutes.⁴⁴

c. *The Espionage Act*

Convertino alleges that Ashenfelter's Article harmed national security and the “War on Terrorism” by, among other things, disclosing the identity of Convertino’s confidential terrorism case informant, thereby hampering the government’s ability to learn about future terrorist attacks and recruit other such informants in the future.⁴⁵ Moreover, the OPR report that Convertino alleges was given to, and partially republished by, Ashenfelter could have contained additional classified or confidential, terrorism-related information.

⁴³ 18 U.S.C. § 4.

⁴⁴ See, e.g., *McNally v. United States*, 483 U.S. 350 (1987) (reversing this Court’s endorsement of DOJ’s creative application of mail fraud statute).

⁴⁵ Ex G ¶ 125.

The three most recent Attorneys General have all opined that journalists could be prosecuted and imprisoned for publishing confidential government information.⁴⁶ In the Pentagon Papers Case,⁴⁷ two Justices would have ruled that the *New York Times* could be prosecuted for violating the Espionage Act. Several journalists *actually were jailed* under the Act shortly after it passed.⁴⁸

More recently, two officials of the American Israel Public Affairs Committee (“AIPAC”) were jailed and charged under the Espionage Act for receiving information from an official source (a former Pentagon analyst) and transmitting it to others, including reporters.⁴⁹ This is exactly what journalists such as Ashenfelter do every day.⁵⁰ The trial judge in that case expressed his view, on the record, that the Act could be “applie[d] to academics, lawyers, journalists, professors, whatever.”⁵¹ It is certainly conceivable that the DOJ could view the transaction between Ashenfelter and his source(s) as materially identical to that in the AIPAC case, and prosecute them accordingly.

3. The Privilege’s Protections Are Exceedingly Liberal

The Fifth Amendment to the U.S. Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”

⁴⁶ Ex K (Articles Regarding AG Statements re: Prosecuting Journalists).

⁴⁷ *New York Times v. U.S.*, 403 U.S. 713 (1971).

⁴⁸ Ex L (*Reporters or Spies?*, Nov. 1, 2006).

⁴⁹ Ex M (Superseding Indictment, *U.S. v. Franklin*. No. 1:05CR225 (E.D. Va)).

⁵⁰ Ex N (Wall Street Journal editorial).

"[C]ourts have repeatedly held that the privilege against self-incrimination justified a person in refusing to answer questions at a deposition."⁵²

"This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure."⁵³ "The privilege . . . not only extends to answers that would themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish *a link in the chain of evidence* needed to prosecute the claimant for a federal crime."⁵⁴

"A witness invoking the privilege need not carry a burden . . . to persuade the judge that the answer sought would be incriminating."⁵⁵ Rather, the court must accept the claim of privilege unless it is "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers *cannot possibly* have such tendency to incriminate."⁵⁶ "The right to assert one's privilege . . . does not depend upon the *likelihood*, but upon the

⁵¹ Ex O (various articles).

⁵² Wright, Miller & Marcus, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2018, pp. 272-73 (internal citations omitted).

⁵³ *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

⁵⁴ *Id.*; *United States v. Grable*, 98 F.3d 251, 256 (6th Cir.1996), *cert. denied*, 519 U.S. 1059 (1997) (emphasis added).

⁵⁵ 1 MCCORMICK ON EVIDENCE (6th ed.) § 132 at p. 559; *Morganroth*, 718 F.2d at 169 ("a witness [does not have] the burden of proof on this issue").

⁵⁶ *Hoffman v. U.S.*, 341 U.S. 479, 488 (1951) (emphasis original, internal quotations and brackets omitted).

possibility of prosecution.”⁵⁷ “[I]t is only where there is but a fanciful possibility of prosecution that a claim of fifth amendment privilege is not well taken.”⁵⁸

4. The District Court Must Consider Any Fact From Any Source, and Even Its Own Imagination, in Weighing the Privilege

“The trial court must make this determination from the facts as well as from his personal perception of the peculiarities of the case.”⁵⁹ In many cases, the district court should be able to make such a determination on the face of the record, since the conceivability of incrimination will be evident. “[T]he court does not need to inquire further as to the validity of the assertion of the privilege, if it is evident from the implications of a question, in the setting in which it is asked, that a responsive answer might [result in] an injurious disclosure.”⁶⁰

If the district court does choose to consider additional evidence in support of Ashenfelter’s privilege, however, this Court requires only that the district court find a basis on which to *imagine the possibility* of Ashenfelter’s criminal exposure:

A witness presents sufficient evidence to establish a foundation for the assertion of the privilege and shows a real danger of prosecution if it is not perfectly clear to the court ‘from a careful consideration of all of the circumstances in the case, that a witness is mistaken, and that the answer[s] cannot possibly have such a tendency to incriminate.’ Stated differently, *sufficient evidence is presented by a witness if a court can, by the use of reasonable inference or judicial*

⁵⁷ *In re Master Key Litigation*, 507 F.2d 292, 293 (9th Cir. 1974) (citing *Hoffman*, 341 U.S. at 486-87) (emphasis added).

⁵⁸ *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 871 (7th Cir. 1979).

⁵⁹ *Hoffman*, 341 U.S. at 487 (internal quotations omitted).

⁶⁰ *Morganroth*, 718 F.2d at 167 (citing *Hoffman*, 341 U.S. at 486-87).

*imagination, conceive a sound basis for a reasonable fear of prosecution.*⁶¹

Obviously, this is an incredibly low standard of proof.⁶²

5. **The District Court Erred by Requiring Ashenfelter to Personally Testify to All Facts Supporting the Privilege**

a. **The District Court Impermissibly Limits Hoffman**

The district court ignored every one of Ashenfelter's bases to fear prosecution because it had no "personal testimony or other evidence"⁶³ directly from Ashenfelter. It therefore gave "Ashenfelter a further opportunity to either provide the requested information or to properly develop the factual record so that this court may weigh his claim under the Fifth Amendment."⁶⁴ "To that end, the [order required] Ashenfelter to re-appear for a deposition [now set for April 21] and either answer Plaintiff's questions or to be prepared to supply personal statements under oath or provide evidence with respect to each question."⁶⁵ This procedure turns the Fifth Amendment on its head, by requiring a witness to testify in public as to the facts he seeks to protect by his Fifth Amendment assertion.

This is also the *precise opposite* of what *Hoffman v. United States*, one of the seminal Fifth Amendment decisions, requires. In *Hoffman*, a district court held

⁶¹ *Id.* at 169-70 (emphasis added).

⁶² See, e.g., *deAntonio v. Solomon*, 42 F.R.D. 320 (D. Mass. 1967) (upholding assertion of privilege based on possibility of prosecution for adultery).

⁶³ Ex A at 9.

⁶⁴ *Id.* at 10.

a witness in contempt for refusing to answer deposition questions. The Supreme Court reversed. It acknowledged that it is ultimately up to the trial court, not the witness, to decide whether the Fifth Amendment privilege is available. But it also cautioned that “if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, *he would be compelled to surrender the very protection which the privilege is designed to guarantee.*”⁶⁶ That is exactly the unconstitutional corner into which the district court has backed Ashenfelter.

Rather, and logically, it is the responsibility of the reviewing court, informed by the arguments of the parties and any other available information, to weigh the privilege’s legitimacy *after* it is asserted. *Hoffman* instructs that “it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.”⁶⁷ This is particularly true where even seemingly innocuous questions nonetheless may “harbor hidden dangers for the unwary witness,”⁶⁸ who may, by inadvertence, give an answer that waives his privilege against self-incrimination, his attorney-client

⁶⁵ *Id.* (emphasis added, quotation omitted).

⁶⁶ *Hoffman*, 341 U.S. at 486.

⁶⁷ *Id.* at 486-87.

⁶⁸ *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 884 (D.C. Cir. 1981).

privilege, or some other right.⁶⁹ Nothing can be clearer than that the current record in this case fully justifies and supports Ashenfelter's Fifth Amendment assertion.

b. Courts Following Hoffman Have Universally Let Counsel, Rather Than the Witness, Establish the Necessary Facts

"Claims to privilege are often resolved on the basis of proffers of counsel."⁷⁰

Indeed, the district court has not cited—and Ashenfelter has not found—*any* post-*Hoffman* case rejecting an assertion of the Fifth Amendment because the supporting evidence did not originate from the witness's own mouth.

On the other hand, examples of cases are legion in which the incriminating potential of even facially innocuous questions were decided on the basis of record evidence, with the benefit of argument from the witness's counsel. For example, in *Malloy v. Hogan*⁷¹ the witness was asked questions about his knowledge of potentially criminal events for which the statute of limitations had already expired. Upholding the witness's privilege, the Supreme Court noted that "petitioner might apprehend that if this person were still engaged in unlawful activity, disclosure of

⁶⁹ See, e.g., *Anton v. Prospect Cafe Milano, Inc.*, 233 F.R.D. 216, 219-20 (D.D.C. 2006) (upholding witness' invocation of Fifth Amendment at his deposition because questions, even seemingly innocuous ones regarding his employment, the operation of the business and his relationship with the decedent, concern the witness' "involvement with, connection to, and knowledge of" the decedent could furnish a link in the chain and expose him to criminal liability).

⁷⁰ 1 MCCORMICK ON EVIDENCE (6th ed.) § 132, p. 561.

⁷¹ 378 U.S. 1 (1964).

his name might furnish a link in a chain of evidence sufficient to connect the petitioner with a more recent crime for which he might still be prosecuted.”⁷²

This Court’s 1963 decision *In re Atterbury*.⁷³ vacated a trial court’s refusal to consider third-party testimony and legal argument supporting a witness’s privilege. This necessarily means that such sources *can* be sufficient sources of cognizable facts. *Atterbury* also collected similar cases in which the Supreme Court summarily reversed without opinion the refusal to recognize the privilege, citing *Hoffman*.⁷⁴ In one such case, for example, the Second Circuit had denied the privilege to a witness because the questions at issue pertained only to the activities of others.⁷⁵ It takes very little imagination, however, to see that answering such questions could form a link in the chain of evidence (and perhaps waive the privilege) supporting charges of conspiracy, or related to more recent activities of such persons, like sources.⁷⁶ In another such case, the Supreme Court summarily

⁷² *Id.* at 13.

⁷³ 316 F.2d 106 (6th Cir. 1963).

⁷⁴ *Id.* at 110.

⁷⁵ *United States v. Singleton*, 193 F.2d 464, 466 (3d Cir. 1952); *rev’d*, *Singleton v. United States*, 343 U.S. 944 (1952).

⁷⁶ *See, e.g., Malloy*, 378 U.S. at 13-14 (“An affirmative answer to the question [about knowing a certain person] might well have either connected petitioner with a more recent crime, or at least have operated as a waiver of his privilege with reference to his relationship with a possible criminal”).

reversed the denial of the privilege where (as here) a witness refused the trial judge's demand to personally explain on the record his basis for asserting it.⁷⁷

c. *The District Court's Focus on "Innocuous" Questions Is a Backwards Approach That Misses the Point of the Privilege*

In its February 26, 2009 Order, the district court took issue with Ashenfelter's supposedly "frivolous" assertion of the privilege in response to several questions it deemed patently innocuous, without discussing whether answering such questions might (in the district court's opinion) constitute waiver.⁷⁸ *But this approach to the issue is exactly backwards.* "[I]n determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry."⁷⁹

For example, during the February 11 oral argument, the district court asked pointed questions of Ashenfelter's counsel as to how Ashenfelter could justify refusing to provide his address.⁸⁰ Counsel explained that the question could be understood as asking for Ashenfelter's business address, which could, in turn, provide a link in the chain of evidence should a prosecution ensue in which case

⁷⁷ *United States v. Trock*, 232 F.2d 839, 841 (2d Cir. 1956); *rev'd*, *Trock v. United States*, 351 U.S. 976 (1956).

⁷⁸ Ex A at 7 & n.5.

⁷⁹ *Malloy*, 378 U.S. at 13 n.9 (citation omitted).

the DOJ would have to prove where Ashenfelter worked and that he was the author of the Article.⁸¹ Several cases have, in fact, upheld similar refusals to provide either a business or residential address.⁸²

The district court should have applied its experience, intelligence, and imagination to determine the incriminating nature of the questions asked, in light of the “obscure and unlikely” means prosecutors use to prove crimes.⁸³ Ashenfelter’s successful assertion of privilege would end Convertino’s ability to seek any information relevant to his lawsuit (by means of direct or indirect questions). Any remaining, truly innocuous questions would, by definition, be irrelevant under FRE 401, and hence not discoverable under FRCivP 26(b).

6. The District Court Misread This Court’s *Morganroth* Decision

The district court premised its rulings on a mistaken interpretation of this Court’s *In re Morganroth*.⁸⁴ There, Morganroth asserted the Fifth Amendment privilege solely because his answers could have contradicted testimony he had given in previous cases. “At issue [in *Morganroth*, therefore, was] what sort of

⁸⁰ Ex J at 12-14.

⁸¹ *Id.*

⁸² *See Atterbury*, 316 F.2d at 110 (explaining the *Trock* and *Simpson* holdings, both of which were summarily reversed on the basis of *Hoffman*).

⁸³ *See id.* (explaining that one of the questions for which privilege was upheld in *Trock* included whether the witness could type; and that the questions in *Simpson* included the witness’s age); *see also Trock*, 232 F.2d at 843 (rejecting the privilege as applied to “innocuous questions”), *rev’d*, 351 U.S. 976.

⁸⁴ 718 F.2d 161 (1983) (cited by district court as “*Morganroth v. Donovan*”).

showing must be made by a witness to justify the invocation of the fifth amendment privilege *when the only possible risk of prosecution which might flow from testimony in a subsequent proceeding is for perjury.*⁸⁵ The *Morganroth* majority found this issue unresolved by *Hoffman*, because it had no information about the prior testimony, and therefore no basis to determine the reasonableness of the feared prosecution. Under those circumstances, *Morganroth* instructed that,

[s]hort of uttering statements or supplying evidence that would be incriminating, a witness must supply personal statements under oath or provide evidence . . . to indicate the nature of the criminal charge which provides the basis for his fear of prosecution and, if necessary to complement non-testimonial evidence, personal statements under oath to meet the standard for establishing reasonable cause to fear prosecution under this charge.⁸⁶

The district court read this language as limiting *Hoffman* only to cases where the incriminating nature of a deposition question is patently incriminating based on facts already in evidence, and, in all other cases, creating a requirement of personal testimony under oath to support any assertion of the Fifth Amendment.⁸⁷

This is a clear misinterpretation that works a gross injustice on Ashenfelter. First, both internal⁸⁸ and external⁸⁹ evidence makes plain that *Morganroth's* rule is

⁸⁵ *Id.* at 166 (emphasis added).

⁸⁶ *Id.* at 169-70 (emphasis added).

⁸⁷ Ex A at 5-9; *see, e.g., id.* at 8 (“the court finds itself outside a pure *Hoffman* analysis, because the fear of prosecution is not patently clear.”).

⁸⁸ *Morganroth*, 718 F.2d at 165 (noting that the “privilege is asserted solely because the witness alleges he is apprehensive of . . . a possible perjury charge”); *id.* at 168 (“*Hoffman* [is] of little help . . . due to the nature of the perjury offense”);

limited to its facts—that is, to cases in which the only basis for asserting the privilege is possible perjury for discrepancies between that testimony and earlier cases that the court knows nothing about. Second, even if *Morganroth* did purport to limit the Supreme Court’s expansive interpretation of the Fifth Amendment in the long-standing *Hoffman* case, it would be powerless to do so.”

Third, Ashenfelter can, and has, satisfied even the *Morganroth* procedure, without having to submit to another open-ended deposition. *Morganroth*’s first step is for the witness to provide “evidence” supporting his claim. He did that through counsel on February 11, and *Morganroth* contains no requirement that this evidence come directly from the witness’s mouth. In fact, the decision requires sworn testimony only “if necessary to complement non-testimonial evidence.” Ashenfelter has taken this step, too, by supplying the district court with an *in camera*, *ex parte*, sworn declaration containing all of the facts supporting the assertion that he is willing to personally share. Both the declaration and the arguments of Ashenfelter’s counsel provide the “concrete information to work

id. at 169 (“perjury prosecutions . . . present special problems in determining appropriate invocation of the fifth amendment”); *id.* at 171 (Jones, J., dissenting on the grounds that the majority limited the issue as “sort of showing must be made . . . when the only possible risk of prosecution . . . is for perjury” (emphasis original)).⁸⁹ See *Davis v. Straub*, 430 F.3d 281, 289 (6th Cir. 2005) (“The issue resolved in *Morganroth* [was procedure for supporting a] fear of prosecution” *in the particular context of possible incrimination for perjury*) (emphasis added).

with⁹⁰ that was missing in *Morganroth*. Nothing would be gained by forcing Ashenfelter to also sit through another deposition, at which he will again assert his privileges in order to suffer a contempt to invoke appellate review.

It is now up to the courts to determine if his assertions of privilege could conceivably be justified. The district court ignored ample evidence—including the DOJ's own admission—that a disclosure could result in a prosecution of Ashenfelter, as well as the numerous avenues of potential prosecution identified by Ashenfelter's counsel. This inexplicable procedure ignores binding precedent and deprives Ashenfelter of the privilege against self-incrimination afforded to him by the Fifth Amendment to the U.S. Constitution.

E. Ashenfelter's First Amendment Claim Is a Matter of First Impression and Considerable Constitutional Importance

For purposes of judicial economy, the Court should also consider at this time Ashenfelter's also-rejected reliance on the Reporter's Privilege derived from the First Amendment and FRE 501.⁹¹ This Court has never considered whether such a privilege exists in a civil context. It has only considered the issue once, in the *grand jury* context.⁹² But the district court here construed that 22-year-old, off-point decision as "binding" precedent, labeling this Court a "minority of one" on

⁹⁰ *Morganroth*, 718 F.2d at 168.

⁹¹ *See id.* at 164 (considering other issues beyond those certified for appeal).

⁹² *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).

the issue and criticizing a contrary ruling by Judge McKeague.⁹³ By definition, that is a highly debatable legal conclusion that ought to be vetted by this Court before Ashenfelter suffers incarceration for disputing it.⁹⁴

Even if this Court's 22-year-old grand jury case were applicable, therefore, the uniformly opposite developments in federal common law⁹⁵ suggest the viability of the privilege under FRE 501, which "manifested [a public policy] not to freeze the law of privilege."⁹⁶ The district court refused to even consider this possibility.

The uniform recognition of the privilege by all other federal circuit courts to consider it should come as no surprise. "The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people, and bottomed on a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."⁹⁷ Failure to provide a reporter's privilege "will jeopardize the

⁹³ Ex P (Aug. 29, 2008 Order) at 11-12 (criticizing *Southwell v SPLC*, 949 F.Supp. 1303 (W.D. Mich. 1996) (McKeague, J.)).

⁹⁴ See Ex Q (*Hatfill v. Mukasey*, No 08-5049, D.C. Cir. Mar. 1, 2008) (stay pending appeal of contempt sanctions against reporter protecting confidential source).

⁹⁵ See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 181 (2d Cir. 2006) (Sack, J., dissenting) ("federal common-law protection for journalists' sources under [Rule] 501" has developed); *Southwell*, 949 F. Supp. at 1311 ("nine of the twelve federal circuit courts of appeals have recognized a qualified privilege for reporters").

⁹⁶ *Trammel v. United States*, 445 U.S. 40, 47 (1980).

⁹⁷ *United States v. Criden*, 633 F.2d 346, 355 (3rd Cir. 1980) (citations omitted).

journalist's ability to obtain information on a confidential basis.”⁹⁸ Only days ago, Judge Wilkinson of the Fourth Circuit wrote, “the First Amendment should never countenance the gamble that informed scrutiny of the workings of government will be left to wither on the vine. That scrutiny is impossible without some assistance from inside sources Indeed, it may be more important than ever that such sources carry the story to the reporter, because there are, sad to say, fewer shoeleather journalists to ferret the story out.”⁹⁹

These vital First Amendment interests require protecting reporters’ confidential sources in all but the most extreme cases:

“[I]n the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished. Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters.”¹⁰⁰

Clearly, the overwhelming abundance of federal common law—including a decision by Judge McKeague—recognizes a reporter’s privilege derived from the First Amendment and rooted in deep concern for the vitality of our nation’s democracy. It deserves far more serious consideration than it was given it here.

⁹⁸ *Baker v. F & F Inv.* 470 F.2d 778, 782 (2d Cir. 1972).

⁹⁹ *Andrew v. Clark*, ___ F.3d ___, No. 07-1184, *slip op* at 22 (4th Cir. April 2, 2009) (Wilkinson, J., concurring).

¹⁰⁰ *Zerilli v. Smith*, 656 F.2d 705, 710-11, 712 (D.C. Cir. 1981).

F. The Errors Here Implicate Important Problems Capable of Repetition

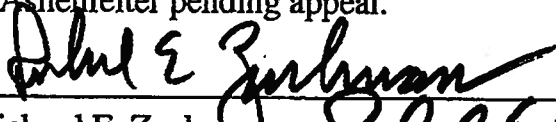

If this district court can apply to Ashenfelter these mistaken interpretations of the constitutional privileges afforded by the First or Fifth Amendments, then any district court in this circuit can do the same to any witness. It is also reasonable to assume that most witnesses (whether reporters or otherwise) subjected to such intense coercion to provide more testimony than the Fifth Amendment requires will relent and comply, rather than risk contempt—thereby depriving this Court of the opportunity to correct the error and set the record straight for future cases.

IV. Conclusion

Ashenfelter requests a writ of mandamus that (1) stays all proceedings in the district court pending further order by this Court, and (2) upholds the privileges that Ashenfelter has asserted under both the First and Fifth Amendments. Alternatively, Ashenfelter seeks a writ directing the district court to issue a final order that resolves Ashenfelter's Fifth Amendment claims based on the information contained in his *ex parte* declaration, and to stay the scheduled deposition and any sanctions against Ashenfelter pending appeal.

Date: April 8, 2009

By:



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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2009, I submitted the foregoing document to the Clerk of the Court by Federal Express. I also caused a copy of same to be served on the following by Federal Express:

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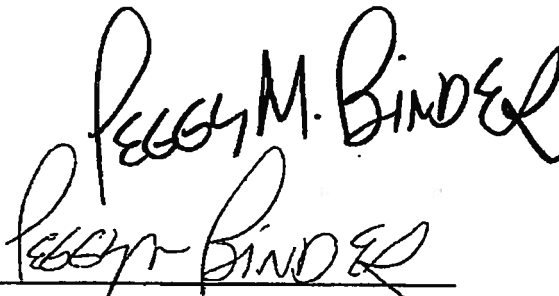
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