

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

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RICHARD G. CONVERTINO		)	
		)	
	Plaintiff,	)	
		)	
v.		)	Case No. 07-CV-13842
		)	Assigned to: Hon. Robert H. Cleland
UNITED STATES DEPARTMENT OF JUSTICE,		)	
<u>et al.</u>		)	
		)	
	Defendants.	)	
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**PLAINTIFF RICHARD G. CONVERTINO’S SUPPLEMENTAL  
BRIEF IN SUPPORT OF HIS ARGUMENT THAT DAVID ASHENFETLER  
HAS WAIVED ANY FIFTH AMENDMENT PRIVILEGE**

At the April 21, 2009 deposition of David Ashenfelter, this Court sustained his assertion of the Fifth Amendment in response to Mr. Convertino’s questions regarding the identity of his editors and source(s). As requested by the Court, Mr. Convertino hereby files this brief in support of his oral request that the Court reconsider this ruling on the grounds that Mr. Ashenfelter waived any Fifth Amendment privilege he had as to the identity of his source(s) when he filed his March 26, 2008 affidavit in support of his opposition to Mr. Convertino’s motion to compel. *See*, Ex. 1, Declaration of David Ashenfelter (hereinafter “Affidavit”).

**ARGUMENT**

**I. MR. ASHENFELTER’S HAS WAIVED HIS FIFTH AMENDMENT RIGHTS**

On March 26, 2008, David Ashenfelter filed an affidavit swearing that he “wrote the article entitled ‘Terror case prosecutor is probed on conduct,’ published in the [Detroit] *Free Press* on January 17, 2004” (hereinafter “the Article”). Affidavit, ¶ 3. He also swore that:

Each statement of fact I made in the Article was true, to the best of my knowledge and belief. Specifically, I wrote in the Article that it was based on information from “[Justice Department] officials, who spoke on the condition of anonymity, fearing repercussions.” That was true.

Affidavit, ¶ 4. By declaring, under oath, that the facts printed in the Article were true, and that his sources worked for the Department of Justice (hereinafter “DOJ”), Mr. Ashenfelter has waived any Fifth Amendment privilege he had with respect to these topics, and must be compelled, at a minimum, to identify which DOJ officials provided him with the information.

The Supreme Court has repeatedly held that a witness cannot “take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination.” *Brown v. United States*, 356 U.S. 148, 155 (1958).

In that case, the Supreme Court explained:

The witness himself... determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment... a positive invitation to mutilate the truth a party offers to tell... The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.

*Id.* at 155-156; *accord McGautha v. California*, 402 U.S. 183, 215 (1971) (“It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination.”); *Rogers v. United States*, 340 U.S. 367, 373 (1950) (“where criminalizing facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details”); *Johnson v. United States*, 318 U.S. 189, 195 (1943) (“voluntary offer of testimony upon any fact is a waiver [of the Fifth Amendment] as to all other relevant facts, because of the necessary

connection between all”). Indeed, the Sixth Circuit has also held that “disclosure of an incriminating fact generally waives the privilege as to details...” *United States v. La Riche*, 549 F.2d 1088, 1096 (6th Cir. 1977).<sup>1</sup> Accordingly, as Mr. Ashenfelter himself raised the issue of the truthfulness of his story and the identity of his source(s) in sworn testimony, he has waived the Fifth Amendment with respect to further questions on these topics.

Nor does it matter that Mr. Ashenfelter gave his testimony in the form of an affidavit, since “[a]n affidavit operates like other testimonial statements to raise the possibility that the witness has waived the Fifth Amendment privilege.” *In re Edmond*, 934 F.2d 1304, 1308-1309 (4th Cir. 1991); accord *United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990) (“the fact that an affidavit was involved rather than direct testimony has no meaningful significance. What matters is whether a testimonial statement was involved.”); *Tolliver v. Fed. Republic of Nigeria*, 265 F. Supp. 2d 873, 876 (W.D. Mich. 2003) (witness not permitted to invoke Fifth Amendment and then submit affidavit on same material); *Nutramax Labs v. Twin Labs*, 32 F. Supp. 2d 331, 334 (D. Md. 1999) (a witness who filed two affidavits with the court waived his right against self-incrimination even though the testimony was facially innocent).

In each of the above cases, the witness in question had successfully asserted the Fifth Amendment to avoid discovery, but also submitted an affidavit on the same matters in support of his opposition to a motion for summary judgment. Each of the respective courts held that such an action constituted waiver of the Fifth Amendment privilege, as a witness cannot use the Fifth Amendment “to insure that his unquestioned, unverified affidavit would be the only version...” the Fifth Amendment privilege cannot be invoked as a shield to oppose depositions while

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<sup>1</sup> The Sixth Circuit also warned that “waiver does not occur where further disclosure carries a risk of incrimination beyond that raised by previous testimony,” *La Riche*, 549 F.2d at 1096, however no such risk exists here. Disclosing the identities of his source(s) is, in itself, no more incriminating than revealing the fact that they exist.

discarding it for the limited purpose of making statements to support a summary judgment motion.” *In re Edmond*, 934 F.2d at 1308.

Nor would it be appropriate for the Court to “remedy” this matter by simply striking the Affidavit. *See, e.g., Brown*, 356 U.S. 155-56; *In re Edmond*, 934 F.2d at 1309; *Parcels of Land*, 903 F.2d 36, 43. Unlike *In re Edmond*, *Parcels of Land*, *Tolliver*, and *Nutramax*, where the court, in its discretion, struck the witness’ affidavit from its consideration of a *pending* motion for summary judgment, the motion Mr. Ashenfelter’s Affidavit was submitted to oppose has already been decided by this Court.<sup>2</sup> Mr. Ashenfelter, having waived his Fifth Amendment rights in order to obtain the benefit of sworn testimony in support his opposition to Mr. Convertino’s motion to compel, cannot now retract that testimony in order to use the Fifth Amendment to avoid complying with the enforcement of the Court’s order granting that motion. To simply strike the Affidavit would run exactly contrary to the above Supreme Court precedent by allowing the witness to support his position with sworn testimony and then invoke the Fifth Amendment to deny the opposing party the right to explore its basis. Indeed, the Supreme Court addressed exactly this set of circumstances in *Rogers*:

[The witness] expressly placed her original declination to answer on an untenable ground.... Petitioner’s claim of the privilege against self-incrimination was pure afterthought. Although the claim was made at the time of her second refusal to answer in the presence of the court, it came only after she had voluntarily testified to her status as an officer of the Communist Party of Denver. To uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony.

*Rogers*, 340 U.S. at 371.

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<sup>2</sup> The fact that the Court has already ruled on Mr. Convertino’s motion to compel does not mean that this is a separate “proceeding” to which the earlier waiver does not apply. *See Parcels of Land*, 903 F.2d at 43 (holding that an invocation of the Fifth Amendment to avoid a deposition during discovery was part of the same “proceeding” as the later motion for summary judgment that the witness submitted his affidavit to oppose.

Moreover, even if Mr. Ashenfelter were to allege that he had not considered the Fifth Amendment implications of filing his Affidavit, the Court must still find waiver. Outside of a custodial context, waiver need not be knowing and/or intelligent. *Garner v. United States*, 424 U.S. 648, 654 n. 9 (1976); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 222-227, 235-240, 246-247 (1973).

Accordingly, by providing sworn testimony that the facts in the Article are true, and that his source(s) worked for the Department of Justice, he cannot now rely on the Fifth Amendment to avoid giving further testimony on those subjects. The Court should thus reconsider its decision to sustain Mr. Ashenfelter's assertion of the Fifth Amendment and order him to answer Mr. Convertino's questions on these subjects.

## **II. THE COURT SHOULD RECONSIDER AS A MATTER OF PUBLIC POLICY**

Aside from Mr. Ashenfelter's unequivocal waiver, the Court should reconsider its decision to sustain his assertion of the Fifth Amendment as a matter of public policy. To allow a journalist to openly and notoriously publish allegedly factual information, and then permit him to use the Fifth Amendment to shield that same information from scrutiny, turns the Fifth Amendment on its head. A journalist cannot both wantonly publish information attributed to anonymous sources and then refuse to identify those sources on the grounds that their identities could lead to evidence that, in publishing his story, he may also have committed a criminal offense (such as receiving "stolen" government documents<sup>3</sup>). This has nothing to do with the privacy protections that the Fifth Amendment was enacted to protect and Counsel for Mr.

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<sup>3</sup> Mr. Convertino would also like to draw the Court's attention to Mr. Ashenfelter's privilege log, submitted as Exhibit A to Mr. Convertino's 4/29/2009 renewed motion to compel the Detroit Free Press, which contains no mention of any documents from the relevant time period whatsoever aside from correspondence and memoranda. If Mr. Ashenfelter possesses "stolen" government documents, he should be sanctioned for falsifying his log.

Convertino is aware of no cases where such an abuse of Constitutional protection has been allowed to stand. The fact that Mr. Ashenfelter has admitted to having no knowledge of any pending investigations into his conduct, and can point to no other cases where a journalist has been prosecuted for similar conduct, only reinforces Mr. Convertino's argument that Mr. Ashenfelter raised the privilege in bad faith.

As Mr. Convertino pointed out in his original motion to compel, the Supreme Court has expressed deep skepticism about this type of situation, holding that "we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it..." *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). To allow Mr. Ashenfelter to abuse the Fifth Amendment in this way will only invite other reporters to do so in the future.

For these reasons, and the fact that Mr. Ashenfelter's conduct, including but not limited to the filing of his sworn Affidavit and the publication of the Article, unequivocally waives his alleged Fifth Amendment privilege, the Court should reconsider its April 21, 2009 holding and compel Mr. Ashenfelter to, at a minimum, identify his source(s).

Respectfully submitted,

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Dated: May 5, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that on May 5, 2009, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system, which shall send notice to all counsel of record.

/s/ Erik D. Snyder

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