

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 35037

WALTER R. BURNETTE,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF CLARK, AND THE
HONORABLE JAMES C. MAHAN, DISTRICT
JUDGE,

Respondents,

and

CMI CORPORATION,

Real Party in Interest.

FILED

DEC 20 1999

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY: *J. Bloom*
CHIEF DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF PROHIBITION

This original petition for a writ of prohibition challenges an order of the district court requiring petitioner to appear at a judgment debtor's examination. On October 13, 1999, the district court entered an order directing that petitioner Walter R. Burnette attend a judgment debtor's examination on November 18, 1999, and answer all questions asked at the examination by the real party in interest, CMI Corporation (CMI).¹ Burnette argues that the Fifth Amendment privilege against self-incrimination shields him from appearing at the examination and answering all questions.

¹We recognize that the date for the November 18, 1999, hearing has passed. However, it appears from the district court's calendar that petitioner again asserted his Fifth Amendment privilege at the hearing and that a second hearing on an order to show cause is now set for December 20, 1999. Thus, the substance of this petition does not appear moot.

Specifically, Burnette asserts that he is currently being criminally investigated by the Internal Revenue Service and that disclosing information regarding his income and bank accounts may provide incriminating evidence against him. Having reviewed the petition, we conclude that Burnette has failed to demonstrate that this court's intervention by way of extraordinary relief is warranted at this time.

The Fifth Amendment privilege "can be asserted in any proceeding, civil or criminal . . . ; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *United States v. Bodwell*, 66 F.3d 1000, 1001 (9th Cir. 1995) (quoting *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972)). The privilege may be invoked during a judgment debtor's examination. See, e.g., *United States v. Jones*, 703 F.2d 473 (10th Cir. 1983) (holding that taxpayers could refuse to answer questions regarding financial affairs at judgment debtor's examination where answers could lead to criminal prosecution for tax evasion).

The mere bald assertion of the privilege is insufficient to sustain a Fifth Amendment claim, see *Brunswick Corp. v. Doff*, 638 F.2d 108, 110 (9th Cir. 1981); the claimant must show that his testimony would support a criminal conviction or furnish a link in the chain of evidence needed to prosecute the claimant, see *United States v. Rendahl*, 746 F.2d 553, 555 (9th Cir. 1984). However, this does not mean that the witness must show there is a pending criminal prosecution, only that the chance of prosecution exists. See *In re Braun*, 502 N.W.2d 219, 221 (Minn. Ct. App. 1993).

Lastly, in determining whether "a real and appreciable danger of incrimination exists," the trial court must specifically examine "'the questions, their setting, and the peculiarities of the case.'" *United States v. Drollinger*, 80 F.3d 389, 392 (9th Cir. 1996) (quoting *United States v. Neff*, 615 F.2d 1235, 1240 (9th Cir. 1980)).


From the foregoing, we conclude that Burnette has a right to assert his Fifth Amendment privilege at a judgment debtor's examination if he has a reasonable belief of possible criminal prosecution. However, the correct and "only way the Fifth Amendment can be asserted as to testimony is on a question-by-question basis." *Bodwell*, 66 F.3d at 1001; accord *Rendahl*, 746 F.2d at 555-56. This petition does not provide us with a record of the specific questions Burnette refused to answer on Fifth Amendment grounds.² We are also unaware if the district court performed an inquiry into the merits of Burnette's Fifth Amendment claim on a question-by-question basis and if so, on what grounds the court refused to sustain the privilege.³

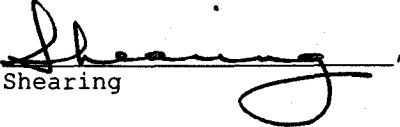
²Although Burnette raised his Fifth Amendment privilege at the first debtor's examination, this court has no record of that hearing.


³Although we deny relief, we wish to make it clear that the district court should inquire into the merits of Burnette's Fifth Amendment claim on a question-by-question basis, if it has not already done so. It is the trial court's role to first determine whether a real and appreciable danger of incrimination exists. See *United States v. Drollinger*, 80 F.3d 389, 392 (9th Cir. 1996). Accordingly, we decline to make this determination in the first instance. See *United States v. Bodwell*, 66 F.3d 1000, 1002 n.2 (9th Cir. 1995) (where the district court had not yet addressed the merits of appellant's Fifth Amendment claim, appellate court declined to do so in the first instance).

Without an adequate showing that the trial court acted in excess of its jurisdiction, we conclude that this court's intervention by way of extraordinary relief is not warranted at this time. Accordingly, we deny the petition. See NRAP 21(b); Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

It is so ORDERED.⁴


_____, J.
Maupin


_____, J.
Shearing


_____, J.
Becker

cc: Hon. James C. Mahan, District Judge
Kenneth G. Frizzell, III
Shea & Carlyon
Clark County Clerk

⁴In light of this order, we deny as moot petitioner's request for a stay of the district court's order.