No. _____

In The
Supreme Court of the United States

STEVE FERGUSON,

Petitioner,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Circuit Court Of The 11th Judicial Circuit In And For Miami-Dade County, Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Mr. Ferguson is a citizen of Trinidad who has been indicted in the United States District Court for the Southern District of Florida and who is being criminally prosecuted in Trinidad by the government of the Republic of Trinidad and Tobago. The Republic of Trinidad and Tobago has also brought a civil action against Mr. Ferguson in the state of Florida. All three proceedings arise out of the same set of allegations.

I. Does Mr. Ferguson have the Fifth Amendment privilege to refuse to answer questions in the civil proceeding which might incriminate him in the criminal proceedings?

II. Can the Republic of Trinidad and Tobago use civil courts in the United States to obtain discovery in an attempt to advance its criminal prosecution in Trinidad?

PARTIES TO THE PROCEEDING BELOW

1. Steve Ferguson
2. The Republic of Trinidad and Tobago
3. Raul Gutierrez, Jr.
4. Brian Kuie Tung
5. Birk Hillman Consultants, Inc.
6. Calmaquip Engineering Corp.
7. Argentum International Marketing Services, S.A.
8. Avcom, Inc.
9. Empresas Sudamericanas, S.A.
10. Keystone Construction Group, Inc.
11. Techton, Inc.
12. Inversiones Lastraval, S.A.
13. Inversiones Rapidven, S.A.
14. Ronald Birk
15. Maria Dubois
16. Leonardo Arturo Mora Rodriguez
17. Steven Birk
18. Carlos Aguera

The undersigned believes that the only parties to the proceeding below that have an interest in the outcome of this petition are Respondent/Plaintiff Republic of Trinidad and Tobago and Respondents/Defendants Gutierrez and Kuie Tung. All other parties have been notified of this petition in accordance with Sup. Ct. R. 12.6.

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DECISIONS BELOW

The decision of the court of appeals denying certiorari is unreported, and is included in the appendix hereto as App. 6. The lower court's order is unreported and is included in the appendix hereto at App. 1-4.

JURISDICTION

This Honorable Court has jurisdiction and the discretion to grant this Petition pursuant to 28 U.S.C. §1257(a) and Supreme Court Rule 10. Mr. Ferguson seeks review of a decree holding that he cannot avail himself of the privilege against Self-Incrimination. Mr. Ferguson sought review from the highest court from which decision could be had in the State of Florida, and otherwise exhausted all possibilities for relief afforded by Florida procedure.

On September 6, 2012, the Third District Court of Appeal ("DCA") of Florida entered an order without opinion denying Mr. Ferguson's petition for writ of certiorari review. Mr. Ferguson timely requested a written opinion, which the Third DCA denied.

Because the Third DCA denied Mr. Ferguson's petition for writ of certiorari without opinion or explanation, the Florida Supreme Court lacked jurisdiction to review the Third DCA's Order. *See R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So.2d 986, 989-90 (Fla. 2004). Therefore, the Third DCA was the

state court of last resort from which Mr. Ferguson could seek review. *See, e.g., Williams v. Florida*, 399 U.S. 78, 79 n.5 (1970) (where the Florida Supreme Court was without jurisdiction to entertain an appeal, "the District Court of Ap[p]eal became the highest court from which a decision could be had.").[1]

CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

[1] *See also* Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 Fla. L. Rev. 21, 80-81 (1993) (citing cases).

> the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protecprotection of the laws.

U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

The underlying civil action was filed in Florida by the government of the Republic of Trinidad and Tobago against Mr. Ferguson based on an alleged conspiracy to inflate bids and prices relating to the construction of an international airport in Trinidad. The Republic of Trinidad and Tobago seeks damages in excess of *$100,000,000.00* (one hundred million dollars).

Simultaneous with the pending Florida civil action, the United States government has indicted Mr. Ferguson in the U.S. District Court for the Southern District of Florida, and the Republic of Trinidad and Tobago is pursuing criminal charges against Mr. Ferguson in Trinidad. The Florida lawsuit, the U.S. Indictment, and the Trinidad Prosecution all arise out of the same set of factual allegations, all seek recovery/restitution based on the same alleged acts, and all are open and pending at this time.

Mr. Ferguson is a Trinidadian citizen currently residing in the islands of Trinidad and Tobago while he awaits the outcome of the pending Trinidad Prosecution. The U.S. government sought Mr. Ferguson's extradition to face trial on the U.S. Indictment, which was declined by the High Court of Trinidad and Tobago. Notwithstanding, Mr. Ferguson remains under indictment in the Southern District of Florida, and the U.S. government has recently stated that it "has no intention of relieving [Mr. Ferguson] on the charges against [him]."

On July 11, 2011, the Republic of Trinidad and Tobago propounded requests for admission on Mr. Ferguson in the Florida civil action which went to the heart of the pending criminal actions. Mr. Ferguson objected to the requests for admission and moved to stay civil discovery only as to himself, arguing that (1) compelling Mr. Ferguson to answer civil discovery would infringe upon his constitutional rights; and (2) the Republic of Trinidad and Tobago should not be permitted to use the liberal discovery procedures applicable to civil suits to circumvent restrictions on criminal discovery.

The trial court denied Mr. Ferguson's motion, holding:

> Inasmuch as Ferguson will no longer be extradited to the United States, he cannot avail himself of a 5th Amended (sic) Privilege which does not exists (sic) in Republic of Trinidad and Tobago.

(App. 3). The Third District Court of Appeal denied Mr. Ferguson's petition for certiorari review without issuing a written opinion (App. 6), and subsequently denied Mr. Ferguson's timely request for a written opinion. (App. 5).

The lower court's order depriving Mr. Ferguson of the most fundamental of constitutional rights is without precedent and without justification. Mr. Ferguson respectfully seeks review.

REASONS FOR GRANTING REVIEW

This Court should grant review because the order on appeal denies Mr. Ferguson, a named defendant in a criminal proceeding in a United States federal court, the core privilege against Self-Incrimination guaranteed to every person by the Constitution.

Granting review of this case allows this Court to resolve a serious point of conflict among the lower courts in the application of Fifth Amendment rights to foreign nationals located abroad. A declaration is needed from this Court that, regardless of an individual's country of citizenship or physical location, any person facing criminal prosecution in the United States has the right to not be made a witness against himself.

Declining review of this case carries with it dire consequences. Allowing the lower court's order to stand endorses the practice of foreign governments

coercing their own citizens to testify against themselves through use of the U.S. civil court system and sends the message to the Republic of Trinidad and Tobago (and other countries) that, when it cannot achieve a conviction through its own system of criminal procedure, it need only turn to the U.S. court system as an end-run around those rules.

To preserve and uphold the Constitution, the lower court's order robbing Mr. Ferguson of his right against Self-Incrimination must be reviewed.

I. The Lower Court's Order Infringes Upon Mr. Ferguson's Rights Under the Fifth Amendment Self-Incrimination Clause

This Court should grant review because the lower court has inexplicably deprived Mr. Ferguson of his constitutional right against Self-Incrimination. The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This guarantee against compulsory Self-Incrimination extends to civil proceedings and encompasses any proceeding where "the answer might tend to subject to criminal responsibility him who gives it." *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924); *see also Michigan v. Tucker*, 417 U.S. 433, 440-41 (1974). The privilege against Self-Incrimination similarly applies with equal force in both state and federal courts. *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (citing the Fourteenth Amendment).

It is one of the most fundamental guarantees of the Bill of Rights and is historically recognized as a "protection to the innocent" and a "safeguard against heedless, unfounded, or tyrannical prosecutions." *Quinn v. U.S.*, 349 U.S. 155, 162 (1955). This Court has never hesitated to underscore the significance of the privilege, describing it as the "most important" exemption from the testimonial duty, *Kastigar v. U.S.*, 406 U.S. 441, 444 (1972) and recognizing it as "the mainstay of our adversary system of criminal justice" and "one of the great landmarks in man's struggle to make himself civilized." *Tucker*, 417 U.S. at 439. As the Honorable Justice Ginsburg recently explained, the privilege itself is "an expression of our view of civilized governmental conduct, [that] should instruct and control all of officialdom[.]" *Chavez v. Martinez*, 538 U.S. 760, 801-02 (2003) (Ginsburg, J., concurring in part and dissenting in part) (internal quotations omitted). So central is the privilege to the U.S. justice system that this Court has fashioned "prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause[,]" which include, *inter alia*, the warnings required by the landmark case of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Chavez*, 538 U.S. at 770-71.

Despite the criminal indictment pending against Mr. Ferguson in the Southern District of Florida, the lower court held that the High Court of Trinidad and Tobago's order quashing extradition somehow divested Mr. Ferguson of his right against

Self-Incrimination. However, to rely on the order quashing extradition as grounds for stripping Mr. Ferguson of his Fifth Amendment rights is to ignore both law and fact. Application of the Self-Incrimination Clause is not limited to active, ongoing criminal prosecutions; rather, the privilege can be asserted in any proceeding where "the information sought . . . could be used in a subsequent state or federal criminal proceeding." *U.S. v. Balsys*, 524 U.S. 666, 672 (1998). In other words, the Self-Incrimination Clause "protects an individual from being forced to give answers demanded by an official in any context when the answers might give rise to criminal liability in the future." *Chavez*, 538 U.S. at 791 (Kennedy, J., concurring in part and dissenting in part); *see also Balsys*, 524 U.S. at 702 (Breyer, J., dissenting) (the Fifth Amendment prohibits compelled testimony where there is even a "theoretical possibility that [the witness's] testimony could lead a state to prosecute him."); *Lefkowitz v. Turley*, 414 U.S 70, 77 (1973) (the privilege can be asserted "in any . . . proceeding, civil or criminal, formal or informal, where the answers *might* incriminate [the witness] in *future* criminal proceedings.") (emphasis added).

The lower court cites no authority to support its unprecedented attempt to deny Mr. Ferguson his rights. Mr. Ferguson remains under criminal indictment in the United States while simultaneously being forced to defend himself against the same allegations brought by the Republic of Trinidad and Tobago in a civil suit in Florida. The U.S. Government maintains

that it does not intend to drop its charges. As long as Mr. Ferguson is under indictment in the Southern District of Florida, any compelled testimony in the civil proceeding could be used in the criminal prosecution. Robbing Mr. Ferguson of his Fifth Amendment rights at this time potentially exposes him to "the cruel trilemma of self-accusation, perjury or contempt," which this Court has refused to permit time and again. *See, e.g., Doe v. United States*, 487 U.S. 201, 212 (1988).

As the Honorable Justice Powell stated, "It is extortion of information from the accused himself that offends our sense of justice." *Couch v. U.S.*, 409 U.S. 322, 328 (1973). However, the lower court's order purports to do just that. In the interest of preserving and furthering "our fundamental values and most noble aspirations," *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964), including the prevention of an unwarranted stripping of Mr. Ferguson's constitutional rights, Mr. Ferguson respectfully requests that this Honorable Court grant review and reverse the lower court's order.

II. Circuit Courts of Appeals are in Conflict Over this Court's Holding in *U.S. v. Verdugo-Urquidez*

While the breadth and importance of the Self-Incrimination Clause cannot be questioned, lower courts are in disaccord over the application of the Fifth Amendment to foreign nationals located abroad

– with the result being that aliens before U.S. courts in some jurisdictions, but not others, are being denied Fifth Amendment privileges. The Constitution, and decisions construing federal constitutional requirements, should be applied uniformly across the land. *Cf. Am. Trucking Assocs., Inc. v. Smith*, 496 U.S. 167, 178 (1990). This Court should grant review to resolve and unify the lower courts on a constitutional issue that has remained a point of conflict and inconsistency for over 20 years.

In *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990), this Court held that the Fourth Amendment protection against unreasonable search and seizure did not apply to a search by U.S. agents of the residence of a Mexican citizen within the sovereign territory of Mexico. In its opinion, the Court noted that the Fourth Amendment "operates in a different manner than the Fifth Amendment, which is not at issue in this case." *Id*. at 264. Nevertheless, the Court later cites the previous case of *Johnson v. Eisentrager*, 339 U.S. 763 (1950) for the overbroad proposition that aliens outside the sovereign territory of the U.S. are not entitled to Fifth Amendment rights. *See Verdugo-Urquidez*, 494 U.S. at 269.

The majority's *dictum* discussion of *Eisentrager* has since been the subject of controversy and confusion, beginning with Justice Brennan's dissenting opinion in *Verdugo-Urquidez*. Justice Brennan argued the majority "mischaracterize[d]" the *Eisentrager* holding, and distinguished *Eisentrager* on the basis that the nonresident aliens in that case were enemy

German soldiers tried in a military court for engaging in continued military activity against the U.S. after Germany's surrender in World War II. *Id*. at 290. Therefore, Justice Brennan concluded, *Eisentrager* denied Fifth Amendment protections to the nonresident aliens "not because they were foreign nationals, but because they were enemy soldiers." *Id*. at 291; *cf. Rasul v. Bush*, 542 U.S. 466, 475-76 (2004) (distinguishing *Eisentrager* because, *inter alia*, the petitioners in *Rasul* "are not nationals of countries at war with the United States.").

Since *Verdugo-Urquidez*, lower courts throughout the country have been in conflict. Some courts have applied the disputed *dictum* literally, broadly declining to extend Fifth Amendment rights to foreign nationals outside the U.S. *See, e.g., Cuban Am. B. Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) ("Cuban and Haitian migrants have no First Amendment or Fifth Amendment rights which they can assert . . . "); *cf. People's Mojahedin Org. of Iran v. U.S. Dept. of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("Aliens receive constitutional protections only when they have come within the territory of the United States. . . .") (internal quotation omitted). Other courts have ruled in line with Justice Brennan's dissent, limiting *Eisentrager* to its facts and holding that "foreign nationals interrogated overseas but tried in the civilian courts of the United States are protected by the Fifth Amendment's self-incrimination clause." *In re Terrorist Bombings of*

U.S. Embassies in E. Africa, 552 F.3d 177, 201 (2d Cir. 2008).[2] None of these courts have definitively compelled a foreign national located abroad to testify against himself. However, as one federal district court judge recently acknowledged, "the Supreme Court has not yet ruled definitively on this specific issue[.]" *U.S. v. Hasan*, 747 F. Supp. 2d 642, 657 (E.D. Va. 2010) (Davis, J.) (but noting that the U.S. government has not contested application of the Fifth Amendment in "the custodial interrogation of a foreign national outside the United States. . . .") (citing cases).

Mr. Ferguson respectfully submits that *Verdugo-Urquidez* and *Eisentrager* must be read in context – and cannot be read as withholding the privilege against compulsory Self-Incrimination from all non-resident aliens in all circumstances. The privilege is to be accorded substantial weight and broad application; "[t]o apply the privilege narrowly . . . is to ignore its development and purpose." *Quinn*, 349 U.S. at 162. That *Eisentrager* declined to extend the full gamut of constitutional protections to enemy soldiers tried in military courts abroad does not mean that foreign nationals facing criminal indictment in the

[2] As Justice Black noted in his partial concurrence, *Eisentrager* dealt only with the "narrow[ ] question" of "whether the judiciary has the power in habeas corpus proceedings to test the legality of criminal sentences imposed by the executive through military tribunals in a country which we have occupied for years." *Eisentrager*, 339 U.S. at 797.

United States can be made to be witnesses against themselves, in utter derogation of the Fifth Amendment, simply because they are not physically present within the borders of the U.S. at a particular point in time. Indeed, as Justice Kennedy acknowledged, where the U.S. prosecutes a foreign national in a U.S. federal court, "all of the trial proceedings are governed by the Constitution." *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring). However, this Court "has not yet ruled definitively" on the application of the Fifth Amendment in this specific circumstance. *Hasan*, 747 F. Supp. 2d at 657. Because one "compelling" reason to grant certiorari is where a state court "has decided an important question of federal law that has not been, but should be, settled by this Court," this Court should grant review. Sup. Ct. R. 10(c); *see also Braxton v. U.S.*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."); *cf. Murphy v. Kentucky*, 465 U.S. 1072, 1073 (1984) (White, J., dissenting).

III. The Trinidad Prosecution Constitutes an Independent Basis for Assertion of the Right Against Self-Incrimination Pursuant to the Same-Sovereign Principle

In *Balsys*, this Court broadly held that "concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause." *Balsys*, 524 U.S. 666, 669

(1998). This Honorable Court should grant review not to overturn *Balsys*, but to answer a question left open by *Balsys*: What happens where the party seeking to compel testimony is the same party that would prosecute a crime that might be revealed through such testimony?

The facts before this Court in *Balsys* are in stark contrast to the facts of this case. In *Balsys*, the respondent was under investigation by the Office of Special Investigations ("OSI") in reference to possible war crimes committed during World War II. *See id*. Relying upon the Fifth Amendment, the respondent refused to answer the OSI's questions based on his fear that his answers *could* subject him to criminal prosecution in Lithuania, Israel, or Germany. *See id*. at 670. It was under these facts that this Court held that fear of foreign prosecution was beyond the scope of the Fifth Amendment. *See id*. at 669.

The *Balsys* Court relied upon what it termed the "same-sovereign" interpretation of the Self-Incrimination Clause, which "provid[es] a witness with the right against compelled self-incrimination when reasonably fearing prosecution by the government whose power the Clause limits, but not otherwise." *Id*. at 673-74. In reaching its holding, the Court returned to its decision in *U.S. v. Murdock*, 284 U.S. 141 (1931) as "confirming [the] same-sovereign principle." Under the same-sovereign principle as defined by *Murdock*, the privilege against compulsory Self-Incrimination is "equivalent" to "full and complete immunity against prosecution *by the government*

compelling the witness to answer." *Murdock*, 284 U.S. at 149 (emphasis added).

Balsys also discussed a line of English cases which dealt with the privilege. Included in these cases was *U.S. v. McRae*, 3 L.R. Ch. 79 (1867), which *Balsys* distinguished on its facts, but which is in line with the facts of this case and is consistent with the same-sovereign principle envisioned by *Murdock*. In *McRae*, the United States brought suit against McRae in England to recover funds McRae had collected in England as a Confederate agent during the Civil War. *See Balsys*, 524 U.S. at 686 (discussing *McRae*). The *McRae* Court "recognized the privilege [against self-incrimination] based on McRae's claim that his testimony would incriminate him in the United States." *Id*. However, the *Balsys* Court distinguished *McRae* from the facts before it by explaining that, in *McRae*, "the party seeking to compel the testimony . . . was also the party that would prosecute any crime under its laws that might thereby be revealed[.]" *Id*. at 686-87.

The facts of this case fit neatly within the circumstances contemplated by *Murdock* and *McRae*, and are easily distinguished from the facts faced by the *Balsys* Court. Unlike the respondent in *Balsys*, whose speculative fear of possible prosecution in a foreign country was insufficient to trigger Fifth Amendment protections, Mr. Ferguson is presently defending himself against open, pending criminal proceedings in Trinidad. Moreover, and most importantly, the party that is seeking to compel Mr.

Ferguson's testimony is the same party that is attempting to criminally prosecute Mr. Ferguson: the Republic of Trinidad and Tobago.

As applied to this case, the *Murdock* same-sovereign principle embraced by *Balsys* is perfectly *in*compatible with *Balsys'* holding that "concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause." This case presents a prime opportunity for this Court to clarify *Balsys* and reconcile application of the same-sovereign principle with the *McRae* scenario in which the foreign government seeking to compel testimony in a civil suit is also the government that would prosecute any crime under its laws. Accordingly, this Court should grant review.[3]

IV. Foreign Governments Cannot Be Permitted to Use Civil Discovery in the Courts of the United States to Aid in Foreign Criminal Prosecutions and to Avoid Their Own Rules of Criminal Procedure

As discussed herein, the plaintiff in the civil suit in Florida is the Republic of Trinidad and Tobago –

[3] The *Balsys* dissents authored by Justices Ginsburg and Breyer also merit acknowledgement. In his dissent, joined by Justice Ginsburg, Justice Breyer asserts that the Self-Incrimination Clause "reflects our fierce unwillingness to subject those suspected of crime to the cruel choice of self-accusation, perjury or contempt . . . *And that value is no less at stake where a foreign, but not a domestic, prosecution is at issue*." *Balsys*, 524 U.S. at 713 (Breyer, J., dissenting) (emphasis added).

the same party that seeks to simultaneously prosecute Mr. Ferguson criminally in Trinidad's court system. There is no dispute that the Florida civil suit and the Trinidad Prosecution arise out of the exact same alleged misconduct. Furthermore, there is evidence that information obtained in the Florida civil suit is used to advance the criminal prosecution in Trinidad.

It is well settled that the strongest case for staying discovery until after the resolution of criminal proceedings is where a party charged with a serious offense is required to defend a civil action involving the same subject matter. *See, e.g., S.E.C. v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980); *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201 (1989) (Pollack, J.) ("The most important factor at the threshold is the degree to which the civil issues overlap with the criminal issues."). The "leading case" on the propriety of staying civil discovery pending the resolution of parallel criminal proceedings is *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962). *Ibid*. In *Campbell*, the court recognized that criminal discovery is, and should be, more limited than civil discovery, and that no civil litigant should "be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit." *Campbell*, 307 F.2d at 487.

Because relations with foreign sovereigns are "entrust[ed] solely to the Federal Government," *Zschernig v. Miller*, 389 U.S. 429, 435 (1968), the availability of courts in the United States to the Republic of Trinidad and Tobago in this instance presents an important question of federal law that warrants this Court's consideration. There is no doubt that it is improper for the U.S. government to use civil discovery as a means to circumvent the rules of criminal procedure. *See U.S. v. Tison*, 780 F.2d 1569, 1573 (11th Cir. 1986); *cf. Campbell*, 307 F.2d at 492-93 (Bell, J., concurring specially) (allowing civil discovery to proceed simultaneously with a criminal action involving the same subject matter is "tantamount" to allowing criminal discovery under rules of civil procedure, which the court is "powerless . . . to authorize."). However, by proceeding with discovery against Mr. Ferguson in the Florida civil suit, the Republic of Trinidad and Tobago is doing what the U.S. government itself may not: unfairly using the civil suit "as a dodge to avoid the restrictions on criminal discovery." *Id.* at 487. This Court should grant review to address the injustice in this case and avoid future abuses of the U.S. court system by foreign governments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE 11th
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO.: 04-11813 CA 30

THE REPUBLIC OF
TRINIDAD AND TOBAGO,

Plaintiffs,

v.

BIRK HILLMAN CONSULTANTS,
INC. ET AL.,

Defendants.
/

OMNIBUS ORDER

THIS CAUSE came on to be heard on November 3, 2011, on the parties following motions: Defendant, Steve Ferguson's Motion to Stay Discovery Pending Resolution of Parallel Criminal Proceedings; Defendant, Brian Kuei-Tung's Motion to Extend Stay Order Pending Resolution of Parallel Criminal Proceedings; the Republic of Trinidad and Tobago's Motion to Compel Raul Gutierrez Jr. to Answer Request for Admissions or, in the Alternative, for Adverse Inferences Based on his Failure to do so; and Raul Gutierrez Jr.'s *Ores Tenus* Motion to Stay Discovery Pending Resolution of Parallel Criminal Proceedings.

The Court has reviewed all of the moving papers, has heard detailed arguments from counsel on

November 3rd, 2011 and has reviewed all of the memorandums submitted to it, including the various status reports filed by the parties as required by previous rulings of this Court. All the Defendants are involved in various criminal proceedings in the Republic of Trinidad and Tobago, generally known as Piarco I and Piarco II. At the present time, all of those proceedings are ongoing in the Republic of Trinidad and Tobago with no future dates for those proceedings to be concluded. Additionally, Defendant Ferguson was ordered to be extradited to the United States in October of 2010. Ferguson appealed that order and on November 7th, 2010, the High Court of Trinidad and Tobago issued an Order Quashing the extradition Order determining that Trinidad and Tobago is the appropriate forum to try Ferguson for his conduct with respect to the Piarco Airport Project. The government of the Republic of Trinidad and Tobago has not appealed the High Court's Order and therefore, Defendant Ferguson will not be extradited to the United States to face criminal charges pending against him here.

All Defendants have asserted their 5th Amendment Privilege Rights under the United States Constitution based on the parallel criminal proceedings ongoing in the Republic of Trinidad and Tobago. To the best of this Court's knowledge none of the Defendants have actually asserted their 5th Amendment Privilege, but have asserted that a continuation of the discovery in the civil proceeding would infringe on their constitutional rights against self incrimination

in the parallel criminal proceeding. Inasmuch as Ferguson no longer will be extradited to the United States, he cannot avail himself of a 5th Amended Privilege which does not exists in Republic of Trinidad and Tobago.

This matter has been stayed for an unusually long period of time. Trial Courts may grant Civil Stays, which has been done in this case, but those Civil Stays are not indefinite. *Urquiza v. Kendall Health Care Group Limited,* 994 So2d 476 (Fla. 3rd DCA 2008). Further, the Defendants have failed to meet their burden that they will be irreparably harmed by any actions of this Court in this civil matter. *Reeves v. Sweetwood Home, Inc.,* 889 So.2d 819 (Fla. 2004).

Further an assertion of the 5th Amendment Privilege is an inadequate basis for the issuance of a Stay. *United States v. Lot 5, Fox Grove,* 23 Fed. 3rd 359 (11th Cir. 1994) and *In Re: Commitment of Smith v. State,* 827 So.2d 1026 (Fla. 2d DCA 2002).

Therefore, based on the foregoing all of the Defendants' Motions for Stay are hereby DENIED. The Republic of Trinidad and Tobago's Motion to Compel Raul Gutierrez Jr. to Answer Request for Admissions is GRANTED. The Defendant, Raul Gutierrez Jr., shall have thirty (30) days to specifically respond to the Request for Admissions. If he fails to do so, then the Plaintiff, Republic of Trinidad and Tobago may apply for an adverse inference based upon his failure to do so.

All prior Orders of the Court shall remain in full force and effect except as otherwise set forth in this Order.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this 3 day of February, 2012.

/s/ Lester Langer
LESTER LANGER
CIRCUIT COURT JUDGE

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2012

OCTOBER 9, 2012

STEVE FERGUSON,	CASE NO.: 3D12-584
Appellant(s)/Petitioner(s),	CONSOLIDATED: 3D12-585
vs.	
THE REPUBLIC OF TRINIDAD AND TABAGO, ETC., ET AL., Appellee(s)/Respondent(s).	LOWER TRIBUNAL NO. 04-11813

Upon consideration, petitioner's motion for certification and request for written opinion is denied.

SHEPHERD, SUAREZ and SALTER, JJ., concur.

[SEAL]

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2012

SEPTEMBER 6, 2012

STEVE FERGUSON,	CASE NO.: 3D12-584
Appellant(s)/Petitioner(s),	CONSOLIDATED: 3D12-585
vs.	
THE REPUBLIC OF TRINIDAD AND TABAGO, ETC., ET AL., Appellee(s)/Respondent(s).	LOWER TRIBUNAL NO. 04-11813

Following review of the petition for writ of certiorari and the response and reply thereto, it is ordered that said petition is hereby denied.

SHEPHERD, SUAREZ and SALTER, JJ., concur.

[SEAL]