IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	**FINAL BRIEF ON BEHALF OF APPELLANT**
v.	)	Crim. App. No. 20090166
Private (E-1) **BOBBY D. MORRISSETTE,** United States Army, Appellant	)	USCA Dkt. No. 11-0282/AR

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Introduction

When Private (E-1) Bobby D. Morrissette agreed to give up his right against self-incrimination, he was supposed to have reaped the benefit of testimonial immunity. What Private Morrissette received instead were general court-martial charges investigated and successfully prosecuted by government actors irrefutably aided by Private Morrissette's very own words. Based on the pervasive uses of his "immunized" words against him, particularly not by one but two prosecution teams and multiple investigators, all of the charges brought against Private Morrissette and his sentence should be set aside.

Issue Granted

WHETHER APPELLANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WAS VIOLATED WHEN HE WAS PROSECUTED FOR OFFENSES ABOUT WHICH HE HAD PROVIDED IMMUNIZED STATEMENTS.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ]; 10 U.S.C. § 866 (2008). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ; 10 U.S.C. § 867(a)(3) (2008).

Statement of the Case

On October 27, 24-25 November, and December 18, 2008, a military judge sitting as a general court-martial tried Private (E-1) Bobby D. Morrissette [hereinafter Appellant]. Contrary to his pleas, Appellant was convicted of two specifications of disobeying a commissioned officer, failure to obey a lawful regulation by participating in a gang initiation where a member of the armed forces was beaten, wrongful use of a controlled substance (ecstasy), wrongfully impeding an investigation (two specifications) and indecent acts, in violation of Articles 90, 92, 112a and 134, UCMJ; 10 U.S.C. §§ 890, 892, 912a and 934 (2005). Appellant was found not guilty of conspiracy to commit aggravated assault, disobeying a commissioned officer, involuntary manslaughter, and wrongfully impeding an investigation, in violation of Articles 81, 90, 119 and 134, UCMJ; 10 U.S.C. §§ 881, 890, 919 and 934 (2005).

The military judge sentenced Appellant to a bad-conduct discharge and forty-two months of confinement. The convening authority approved the adjudged sentence.

The Army Court set aside The Specification of the Additional Charge and The Additional Charge (wrongful use of a controlled substance) and reduced Appellant's sentence by one month but affirmed the remaining findings of guilty on December 22, 2010. (JA I, at 1-11.)

On March 21, 2011, Appellant petitioned this Court for review. This Court granted review of Appellant's issue on April 14, 2011.

Statement of the Facts

On December 16, 2005, the commander of the 21st Theater Sustainment Command [hereinafter "TSC"] ordered Appellant to provide testimony in exchange for a grant of immunity. (JA I, at 426, 452; JA II, at 1019.) The commander's written order stated in pertinent part:

> . . . I order you to fully cooperate with and provide truthful and complete information to law enforcement officers and attorneys during the investigation and to testify at any Article 32, Uniform Code of Military Justice (UCMJ) hearing and court-martial, if any, pertaining to the death of SGT Juwan L. Johnson. Any information given by you pursuant to this order, *or any information directly or indirectly derived from such testimony or other information*, shall not be used against

> you in a trial by court-martial or proceedings under Article 15, UCMJ, except prosecution for perjury, false swearing, giving a false statement, or otherwise failing to comply with this order.

(emphasis added.)

The 21st TSC commander, Brigadier General [hereinafter BG] Scott West, had ordered Private Florentino Charris to provide statements under a December 8, 2005 grant of immunity bearing the same terms as the order to Appellant. (JA I, at 476; JA II, at 1018.)

Prior to obtaining Appellant's immunized statements, the government obtained information from SPC[1] Florentino Charris regarding the night of July 3-4, 2005 - the night SGT Johnson died. That information included: (1) SPC Charris assisted PFC Norman and Appellant with carrying SGT Johnson up to his barracks room; (2) SGT Johnson's lips were a little purple; (3) SGT Johnson's back and one of his thighs was hurting him, and he had bruises on both sides of his body; (4) SGT Johnson "had on some plaid shorts or something", but "he didn't have a shirt on"; (5) SPC Charris stayed over at SGT Johnson's room the night of July 3-4, 2005 because of SGT Johnson's condition; (6) SGT

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[1] The record suggests that, at some point in time during the investigation into SGT Johnson's death, SPC Charris was demoted to PFC. (He is referred to as an E-4 in his first sworn statements to CID but, by the time he received immunity, SPC Charris had become PFC Charris.)

Johnson defecated on himself and he could not urinate; (7) Appellant was a member of the Gangster Disciples who had previously been "Jumped In"; (8) SPC Charris believed Appellant was present at SGT Johnson's "Jump In" because SPC Charris did not see Appellant at the barracks the night in question until SGT Johnson was carried up to his room, and because Appellant had joined others in saying that Johnson was "in" (i.e., "meaning he was now a GD"). (JA I, at 471-473; JA II, at 1016.)

Investigators learned from Appellant's July 5, 2005 non-immunized statements that Appellant had learned of SGT Johnson's death. (JA I, at 533.) They discovered through Appellant's August 10, 2005 sworn statement that: (1) Appellant had received a call from SGT Johnson, (2) Appellant responded by going to SGT Johnson's barracks; (3) Appellant thought SGT Johnson was wearing shorts, boots, and a t-shirt; and, (4) Appellant had himself planned on being "Jumped In". (JA I, at 537-538; JA II, at 1016-1017.)

Prior to the government's taking Appellant's immunized statements, BG West, the 21st TSC Convening Authority, was considering giving all of the suspects in the Johnson case administrative discharges. (JA-II, at 1019.)

In response to the 21st TSC commander's orders, Appellant and SPC Charris provided multiple immunized statements. Appellant provided his first immunized statement on December 21,

2005, at which time SA C. Ezell Sanchez elicited the following information from Appellant:

(1) Everything Appellant said in his last statement is true;

(2) There is nothing more Appellant has to say pertaining to Johnson's death;

(3) Appellant understands the letter of immunity, but he does not know anything else;

(4) Appellant helped SGT Johnson out of SGT Johnson's car;

(5) Appellant knows SGT Johnson was wearing Timberland's, a T-shirt, and he is not sure what else; Appellant knows SGT Johnson's clothes were not clubbing clothes; SGT Johnson was not shirtless when he took him up to his room; SGT Johnson had a shirt on, but he doesn't know what type or color it was;

(6) Appellant thought SGT Johnson was drunk;

(7) Appellant did not know what happened to SGT Johnson;

(8) PFC Norman wasn't present when Appellant took SGT Johnson upstairs; and,

(9) There is nothing else Appellant wanted to add to the statement.

(JA I, at 464; JA-II, at 1019.)

Appellant then provided oral statements to investigators on March 31, 2006 (taken by SA Kim Jones), October 20, 2006 (taken

by SA Luis Garcia, Jr.)[2], and again on December 4, 2006 (taken by SA Dennis Whitfield). (JA I, at 510; JA-II, at 970, 1021-1022.) From these additional immunized statements, investigators elicited from Appellant that: (1) Appellant did not know what caused SGT Johnson's death; (2) Appellant is not a member of the GD; (3) Appellant is getting to his breaking point, due to law enforcement investigations against him, and he is ready to hurt somebody at the slightest provocation, (4) Appellant had nothing to do with SGT Johnson's death; (5) Appellant believes CID is trying to prosecute him for something he did not do; (6) before Appellant goes to jail, he will kill himself; and, (7) Appellant will either walk out of court a free man or inside a body bag. (JA I, at 510; JA-II, at 970, 1021-1022.)

Special Agent C. Ezell Sanchez took multiple immunized statements from SPC Charris, to include on January 10, 2006, February 8, 2006, and February 13, 2006. (JA I, at 149, 477-486; JA-II, at 1020.) From SPC Charris' February 13, 2006 sworn immunized statement, SA Sanchez learned that Appellant, with others, told SPC Charris to keep his mouth shut. (JA I, at 482; JA-II, at 1020.)

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[2] Special Agent Garcia testified at Appellant's trial that he did not know what sort of refusal an immunized accused could give when being questioned by CID because appellant's case was the first time he had worked with immunity. (JA-I, at 309.)

The 21st TSC preferred charges against Appellant in October, 2006, ten months after it had granted Appellant testimonial immunity. (JA I, at 118-119.) The preferral packet contained Appellant's immunized statements. (JA I, at 119.) The 21st TSC's September 14, 2006 Pre Preferral Prosecution Memorandum indicated that "[d]espite the grant of immunity, SPC Morrissette refused to cooperate." (JA I, at 130; JA II, at 990.)

The government did not complete its investigation into SGT Johnson's death until at least February 12, 2007. (JA I, at 499-509.) At that time the government determined the value of a third witness - a Private First Class [hereinafter PFC] Nicole Ellis - whose testimony the government believed could break the case wide open. Private First Class Ellis, who received a grant of immunity in early 2007, was interviewed by SA Sanchez in February 2007. (JA I, at 126-127.)

On February 14, 2007, the 21st TSC referred Appellant's case to a General Court-Martial. (JA-II, at 1002-1008; JA-II, at 1022.) Brigadier General West revoked Appellant's grant of immunity on March 22, 2007. (JA-II, at 1022.)

21st TSC Personnel Exposed to Appellant's Immunized Statements

Captain Joycelyn Stewart, of the 21st TSC, reviewed Appellant's statements in the course of preparing charges against Appellant. (JA-I, at 128.) Special-Agent-in-Charge [hereinafter SAC] William Hughes reviewed all of Appellant's

non-immunized and immunized statements. (JA-I, at 226; 385, 389, 449.) He also directed his investigators' efforts in investigating the Johnson case, to include all of their interviews. (JA I, at 449.) The 21st TSC OSJA and Kasierlautern CID never set up a "Chinese wall" or separate prosecutorial teams before or after granting Appellant and SPC Charris immunity, respectively. (JA-I, at 129-130.)

Disqualification of 21st TSC OSJA and Convening Authority

On May 30, 2007, Colonel James Pohl, military judge, disqualified all members of the 21st TSC Office of the Staff Judge Advocate [hereinafter OSJA] and the 21st TSC Convening Authority from Appellant's case because of their exposure to Appellant's immunized statements. (JA-II, at 1022.) This resulted in 21st TSC's withdrawing and dismissing all charges without prejudice on June 14, 2007. (JA-II, at 1023.)

Partial Redaction of 21st TSC's Case File

Colonel [hereinafter COL] Michael Mulligan, the Deputy Judge Advocate of United States Army Europe (who was previously the Staff Judge Advocate of the 1st Infantry Division and 7th JMTC from 2005 to 2007), decided that Appellant's case would be transferred to the 7th Joint Multi-National Training Command (JMTC), after he redacted all evidence obtained from Appellant's immunized statements. (JA-I, at 46; 81; 84.) Colonel Mulligan had previously discussed Appellant's case with CPT Stewart when

she was preparing to prosecute Appellant for the 21st TSC. (JA-I, at 83-84.) Colonel Mulligan specifically advised CPT Stewart about a gang-activity case (*United States v. Billings*) he had previously prosecuted, directed her to someone who could further assist her with the case, and he ultimately provided CPT Stewart with an expert on gang activity, who aided the government in investigating Appellant[3]. (R. at 239, AE XLIII.)

Because 21st TSC's case file contained fourteen volumes, the redaction process took from September 2007 to June 2008. (R. at 202.) Colonel Mulligan interacted with the new prosecutor - CPT Grace from the 7th Joint Multinational Training Center [hereinafter JMTC] - during the course of his redaction. (R. at 200.) They exchanged e-mails through which COL Mulligan directed CPT Grace to *United States v. Billings* and advised CPT Grace how to charge Appellant for gang-related activity. (R. at 163-4; 213; AE XXIV, pages 1 and 2.)

Transfer of Case File to 7th JMTC

The redacted version of the 21st TSC case file COL Mulligan provided to the 7th JMTC included CPT Stewart's prosecution memorandum, 21st TSC's charge sheets, the previous Article 32 Investigation, the Article 32 Report discussing the charges and

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[3] The individual COL Mulligan had recommended to CPT Stewart as an gang activity expert was Lieutenant Robert Stasch. Lieutenant Stasch testified at the 21st TSC's Article 32 investigation on December 5, 2006. (JA-I, at 83; JA-II, at 1042-1059.)

specifications, as well as CID reports referencing Appellant's October 20, 2006 and December 4, 2006 immunized statements. (JA-I, at 59; 87-89; JA-II, at 1023.)

7th JMTC Personnel Exposed to Appellant's Immunized Statements

Captain Derrick Grace of the 7th JMTC was assigned to prosecute Appellant's case. (JA-I, at 33.) Captain Grace had worked for COL Mulligan when the latter was 7th JMTC's SJA. (JA-I, at 40.) In addition to discussing Appellant's case with COL Mulligan, CPT Grace received 21st TSC's witness list in Appellant's case from a 21st TSC pretrial NCOIC - per the direction of 21st TSC's Chief of Military Justice. (JA-I, at 37; JA-I, at 52-53; JA II-972.) Captain Grace also contacted SA Bellafiore, the case agent assigned to the Johnson case within the Kaiserlautern CID office, for a meeting. (JA-I, at 38.) CPT Grace subsequently met with SA Bellafiore for three hours[4] at the Kaiserlautern office, during which time CPT Grace "had some time to review the case." (JA-I, at 168.)

The 7th JMTC Article 32 investigating officer considered 21st TSC's Article 32 investigation. (JA-I, at 58-59.) It was CPT Grace's opinion that any Article 32 proceeding conducted by the 7th JMTC would supplement 21st TSC's investigation. (JA-I, at 59.) The Article 32 IO also considered the CID activity summary

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[4] During fifteen minutes of this three-hour timeframe, SA Bellafiore and CPT Grace viewed SGT Johnson's barracks room, where SGT Johnson died. (JA-I, at 169.)

of Appellant's October 20, 2006 and December 4, 2006 immunized statements. (JA II, at 1026.)

On June 24, 2008, the 7th JMTC preferred charges against Appellant. (JA I, at 20-22.)

The 7th JMTC Military Judge's Ruling

Confronted with all of the above information, the 7th JMTC military judge - COL Timothy Grammel - denied Appellant's Motion to Dismiss. (JA II, at 1033.) In so denying Appellant's motion, Colonel Grammel specifically found that: (1) the investigation was not completed prior to Appellant's grant of immunity; and, (2) the decision to prosecute was not made prior to the immunized statements. (JA I, at 1032.) In finding the parties bound by COL James Pohl's (the first military judge's) disqualification of the 21st TSC OSJA and convening authority, COL Grammel also found interaction between the 21st OSJA and the 7th JMTC prosecution team, and that COL Mulligan had not completely redacted the case file. (JA II, at 1031.) While finding that a pipeline for Appellant's immunized statements existed between the 21st TSC and the 7th JMTC, COL Grammel nonetheless concluded that there was no impact or influence. (JA II, at 1031-1032.)

Summary of Argument

Appellant provided immunized statements to law enforcement personnel containing information about the night SGT Juwan