IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Index of Brief

Issue Presented:

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

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

Granted Issue

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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (hereinafter UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

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[1] UCMJ, art. 66(b).
[2] UCMJ, art. 67(a)(3).

Statement of the Case

A military judge, sitting alone as a general court-martial, convicted appellant, contrary to his pleas,[3] of disobeying a commissioned officer, wrongful use of a controlled substance, obstructing justice (two specifications), participating in a gang initiation (two specifications), and indecent acts, in violation of Articles 90, 112a, and 134, UCMJ, 10 U.S.C. §§ 890, 912a, and 934.[4] The military judge sentenced appellant to be confined for forty-two months and to be discharged from the service with a bad-conduct discharge.[5] The convening authority approved the sentence as adjudged.[6]

The Army Court reviewed appellant's case pursuant to Article 66(c), UCMJ, and issued a Memorandum Opinion on 22 December 2010.[7] The Army Court disapproved the findings as to The Specification of the Additional Charge and The Additional Charge (wrongful use of MDMA, in violation of Article 112a), but affirmed the remaining findings.[8] After re-assessing the sentence pursuant to *United States v. Sales*[9] and *United States v. Moffeit*,[10] the Army Court affirmed only so much of the sentence

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[3] Joint Appendix (JA) at 396.
[4] JA at 397-98.
[5] JA at 399.
[6] JA at 1094.
[7] JA at 1.
[8] JA at 9.
[9] 22 M.J. 305 (C.M.A. 1986).
[10] 63 M.J. 40 (C.A.A.F. 2006).

as provides for confinement for forty-one months and a bad-conduct discharge.

Appellant petitioned this Honorable Court for review on March 21, 2011, said petition being granted on April 14, 2011.

Statement of Facts

During the evening of July 3, 2005, SGT Juwan L. Johnson was involved in a "jumping in" ceremony for the Gangster Disciples, a local gang.[11] As part of the ceremony, the members of the Gangster Disciples, to include appellant, lined up and circled around SGT Johnson and repeatedly punched and kicked him for a roughly six minute period, to the point where the gang members had to hold SGT Johnson up to allow the beating to continue.[12] Appellant personally punched SGT Johnson no less than twenty times.[13] Following the beating, SGT Johnson was taken away by vehicle to his barracks room where he died the morning of July 4, 2005.[14]

The Investigation

Criminal Investigation Command (CID) initiated an investigation into the death of SGT Johnson on July 4, 2005.[15]

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[11] JA. at 1081-82.
[12] JA. at 1084-89.
[13] JA. at 1089.
[14] JA. at 1091-93; JA at 1015.
[15] JA at 111, 385, 387-88.

CID interviewed Private (PVT)[16] Florentino Charris on July 4, 2005, who provided two different sworn statements regarding the death of SGT Johnson.[17] In the first, provided in the early afternoon, PVT Charris denied knowing what happened to SGT Johnson, but did relate that SGT Johnson called him the morning of July 4, 2005 indicating he was not feeling well. PVT Charris then travelled to SGT Johnson's barracks room and found him lying on his back with purple lips. PVT Charris called the CQ for an ambulance after SGT Johnson became unresponsive.[18]

PVT Charris provided a second sworn statement in the late evening of July 4, 2005, modifying his statement to indicate that SGT Johnson said he had been in a fight downtown, and PVT Charris could see bruises on both sides and the lower part of SGT Johnson's body.[19] PVT Charris also noted he knew appellant, but did not know if appellant was a member of the Gangster Disciples.[20]

On the morning of July 5, 2005, appellant waived his rights and provided his first sworn statement to CID. Appellant stated that on the evening of July 3-4, 2005, he was at a club with

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[16] Florentino Charris was a Specialist (E-4) when he made his July and August 2005 statements. JA at 466, 469, 471. However, by January 2006 he had been reduced to Private (E-1). JA at 477, 479, 482, 484, 860. For purposes of this brief he will be referred to as PVT Charris.
[17] JA at 466-70.
[18] JA at 466-67.
[19] JA at 469-70.
[20] *Id.*

friends from his unit and did not know where SGT Johnson was or what happened to him that evening.[21] Appellant stated he did not learn about SGT Johnson's death until the afternoon of July 4, 2005.[22] Appellant denied being a member of any gang.[23]

During the investigation, on August 10, 2005, both PVT Charris and appellant returned to CID and provided additional sworn statements.[24] Appellant changed his previous sworn statement and explained that SGT Johnson called him the morning of July 4, 2005 and said he was hurt.[25] Appellant travelled to SGT Johnson's barracks, found him in his car, and with the help of PVT Charris and some other individuals, was able to help carry SGT Johnson upstairs to his barracks room.[26] Appellant indicated that SGT Johnson appeared to have been in a fight because his lip was bleeding, and SGT Johnson was wearing "shorts, boots, and a t-shirt."[27] Appellant again denied he was a member of the Gangster Disciples, though he did admit he was supposed to become a member at some point.[28] Appellant again denied knowledge of what happened to SGT Johnson.[29]

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[21] JA at 532-34.
[22] JA at 533.
[23] *Id.*
[24] JA at 471-75, 535-38.
[25] JA at 537-38.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*

In his August 10, 2005 statement, PVT Charris dramatically altered his previous version of events. He admitted that he was aware on July 3, 2005 that SGT Johnson was to be "jumped in" to the Gangster Disciples.[30] He also stated that appellant was both a member of the Gangster Disciples and was likely present during the "jumping in" ceremony for SGT Johnson (though PVT Charris indicated he was not present despite being a member of the Gangster Disciples).[31] PVT Charris again discussed how SGT Johnson was moved to his barracks room and his physical condition, including that SGT Johnson was wearing "shorts, no shirt and Timberland boots."[32]

As the CID investigation continued, on August 19, 2005 Private First Class (PFC) Latisha N. Ellis informed CID that PVT Charris was a member of the Gangster Disciples.[33] In addition, on November 28, 2005, Specialist (SPC) Towanna Thomas informed CID during an interview that on the evening of July 3-4, 2005, SGT Johnson was not wearing "clubbing clothes."[34]

On December 8, 2005 and December 16, 2005, the Commander, 21st Theater Support Command (21st TSC), granted testimonial immunity to PVT Charris and appellant, respectively.[35] The

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[30] JA at 471.
[31] JA at 471-73.
[32] *Id.*
[33] JA at 1018.
[34] JA at 597-98.
[35] JA at 1097, JA at 476.

grants of testimonial immunity were limited to their full cooperation and provision of truthful and complete information pertaining to the death of SGT Johnson.[36]

Post-Immunity

On December 21, 2005, appellant provided his first sworn statement following his grant of testimonial immunity.[37] In that statement, he indicated everything in his "last statement was true," and "[t]here is nothing more that I have to say pertaining to the death of SGT Johnson."[38] Appellant related the following facts in his brief sworn statement: (1) he helped SGT Johnson out of his own car; (2) SGT Johnson was wearing Timberlands and a T-shirt (though appellant could not recall the color) and was unsure of what else, except that they were not "clubbing clothes"; (3) appellant believed SGT Johnson to be drunk and had some beers; and (4) appellant did not see PFC Norman[39] when SGT Johnson was taken upstairs.[40]

On March 31, 2006, appellant provided his second statement orally to Special Agent (SA) Kim Jones.[41] Appellant related that

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[36] JA at 1097, JA at 476
[37] JA at 464.
[38] *Id.*
[39] PFC Norman was a member of the Gangster Disciples present at the jumping-in ceremony of SGT Johnson. JA at 1081-93.
[40] JA at 464.
[41] JA at 646.

he did not have anything to do with the Gangster Disciples, did not know anything about it, and disavowed all knowledge.[42]

In June 2006, during an unrelated investigation into a sexual encounter with a minor local national female at a pool party, SPC Terrance Pope and PFC Anthony Turner informed SA Garcia they had information concerning the death of SGT Johnson, including potential admissions by appellant.[43] The two Soldiers related they had heard appellant and PFC Norman discussing what had happened to SGT Johnson during a barbeque, but appellant and PFC Norman stopped talking when they noticed SPC Pope and PFC Turner.[44]

On October 18, 2006, the Government preferred charges against appellant.[45]

On October 20, 2006, SA Garcia interviewed appellant regarding the sexual assault case involving the minor local national German girl where appellant had been identified as a potential suspect.[46] While doing the initial in-processing and fingerprinting, prior to any questioning, appellant made a spontaneous statement that he was "getting to his breaking point, due to other law enforcement investigations he is involved in, and is ready to hurt somebody at the slightest

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[42] JA at 648.
[43] JA at 662-64, 1021.
[44] JA at 664-65, 1021.
[45] JA at 1002, 1021.
[46] JA at 296, 510, 969, 1021.

provocation."[47] Appellant also stated he dreamed of SA Garcia regularly, remarked about the types of vehicles SA Garcia drives, and that appellant knew where SA Garcia's wife parked and where they met for lunch.[48]

The Government preferred additional charges against appellant on December 4, 2006.[49] That same day, SA Whitfield from CID attempted to re-interview appellant regarding the death of SGT Johnson.[50] However, before attempting to interview appellant, SA Whitfield informed appellant of his rights and that he did not have to answer any questions unless he waived those rights.[51] While being advised by SA Whitfield of the nature of immunity, appellant made spontaneous statements that "he had nothing to do with SGT Johnson's death, that CID was trying to prosecute him for something he did not do, and that before he'd go to jail he would kill himself, and that he would either walk out of court a free man or inside of a body bag."[52] Appellant contacted his defense counsel who agreed he could be

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[47] JA at 296-97, 969, 1021.
[48] JA at 296-97, 969, 1021.
[49] JA at 1006-08, 1021. The additional charges included two specifications of obstruction of justice, in violation of Article 134, UCMJ (dismissed on Feb. 14, 07); conspiracy to commit aggravated assault, in violation of Article 81, UCMJ (dismissed on Feb. 14, 07); and two specifications of disobeying a superior commissioned officer, in violation of Article 90, UCMJ.
[50] JA at 970-71, 1021-22.
[51] *Id.*
[52] *Id.*

interviewed in the presence of his attorneys; however, before any actual interview could commence, the Office of the Staff Judge Advocate directed CID to not conduct the interview.[53]

On July 12, 2007, PFC Latisha Ellis provided a sworn statement to CID concerning the death of SGT Johnson, stating appellant was present at the "jumping in" ceremony and participated in the beating of SGT Johnson, punching him more than twenty times and helping to hold SGT Johnson up while others assaulted him.[54]

The First Court-Martial

On February 14, 2007, 21st TSC referred charges against appellant to a general court-martial.[55] On March 22, 2007, the 21st TSC revoked appellant's grant of immunity.[56]

On March 30, 2007 and April 19, 2007 the original military judge, Colonel (COL) James Pohl, conducted a *Kastigar*[57] hearing concerning appellant's immunized statements. In COL Pohl's initial ruling on April 19, 2007, he found Private Charris' February 2006 statements were derivative evidence of the immunity granted appellant and therefore dismissed Charges I, II, III, IV, and Specification 1 of Charge V.[58] On April 27,

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[53] JA at 970-71, 1021-22.
[54] JA at 499-509.
[55] JA at 1003, 1007.
[56] JA at 1022.
[57] *Kastigar v. United States*, 406 U.S. 441 (1972).
[58] JA at 875.

2007, the Government moved for reconsideration of that ruling.[59] After renewed argument and the presentation of additional evidence, the military judge reversed his April 19, 2007 ruling. The military judge found that no derivative use was made of appellant's immunized statements and that PVT Charris' statements were not derivative because "[k]knowledge by a co-accused of a grant of immunity by itself with no impermissible use of the immunized statements does not trigger the *Kastigar* protections."[60] However, due to the 21st TSC's exposure to appellant's immunized statements, "in an abundance of caution," the military judge disqualified the 21st TSC from further participation in the case.[61] The military judge made clear that no charges were dismissed.[62]

Preparation for the Second Court-Martial

On June 14, 2007, the 21st TSC withdrew and dismissed the charges and specifications against appellant.[63] The 21st TSC forwarded the case to US Army Europe (USAREUR).[64] USAREUR forwarded a redacted case file to the 7th Joint Army Multi-National Training Command (7th JMTC) for potential prosecution, and the Deputy Judge Advocate for USAREUR, COL Michael Mulligan,

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[59] JA at 880.
[60] JA at 952.
[61] JA at 953.
[62] *Id.*
[63] JA at 1023.
[64] JA at 34.

served as the sole individual responsible for redacting appellant's record.[65] To that end, in the fall of 2007 and spring of 2008, COL Mulligan attempted to remove all statements made by appellant following his grant of immunity, all statements made by PVT Charris following appellant's grant of immunity, and any reference to any such statement from the 14 volume record of trial.[66] COL Mulligan forwarded the redacted record to 7th JMTC.[67]

Captain (CPT) Derrick Grace became the lead prosecutor of appellant's case in September/October 2007.[68] In October 2007, CPT Grace attended most of the trial of United States v. Hudson, a companion case of appellant's; however, neither PVT Charris nor appellant testified during that trial, and CPT Grace did not hear anything regarding any statements made by appellant or PVT Charris after 15 December 2005.[69]

On December 4, 2007, CPT Grace received from Staff Sergeant (SSG) Crum (a paralegal in the 21st TSC OSJA) a consolidated witness contact list from the courts-martial of appellant's co-accused, and also the phone number for another witness, Frau Doymus, on December 6, 2007.[70]

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[65] JA at 34.
[66] JA at 76, 79-80.
[67] JA at 76-77.
[68] JA at 33.
[69] JA at 36, 48, 62.
[70] JA at 37, 51-54, 972-74, 975-77.

In March 2008, CPT Grace met with SA Andrew Bellafiore to conduct a site visit of SGT Johnson's room and the site of the "jump-in."[71] CPT Grace specifically informed SA Bellafiore that they were not to discuss anything concerning statements made by appellant or PVT Charris after December 2005.[72] CPT Grace never reviewed the CID file while he met with SA Bellafiore, informing him that he was not allowed to look at it.[73]

In March and April of 2007, Sergeant (SGT) Richard Lukas from the 7th JMTC attempted to contact paralegals at 21st TSC for information regarding witness contact lists.[74] SGT Lukas was eventually informed by the 21st TSC trial counsels that they could not have any involvement with appellant's court-martial and SGT Lukas never received any information.[75]

On April 23, 2008 CPT Grace requested that COL Mulligan obtain from 21st TSC any witness matrixes, pictures from the AR 15-6 investigation, and copies of the no contact order for appellant.[76] On April 29, 2008, CPT McCarthy from 21st TSC provided the requested documents to COL Mulligan who reviewed them, redacted two documents and forwarded the rest to CPT

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[71] JA at 38, 256.
[72] JA at 39.
[73] JA at 257.
[74] JA at 982-85.
[75] JA at 73, 982-85.
[76] JA at 1000-1001.

Grace.[77] On May 6, 2008, COL Mulligan forwarded additional information regarding the no contact order.[78]

That same day, COL Mulligan informed CPT Grace that the final three volumes were ready for pick up.[79] CPT Grace made a general comment in reply indicating he was trying to determine how best to charge appellant's involvement in other "jump-ins."[80] In response, COL Mulligan suggested generally that CPT Grace look to the case of United States v. Billings and to contact the Trial Counsel Assistance Program (TCAP). After an additional e-mail from CPT Grace thanking COL Mulligan, COL Mulligan emphasized that United States v. Billings was not necessarily the answer in this case.[81]

On June 24, 2008, 7th JMTC preferred charges against appellant.[82] On 24 November 2008, the military judge conducted a *Kastigar* hearing, and, on 27 November 2008, denied appellant's motion to dismiss finding that no use or derivative use was made of appellant's immunized statements.[83]

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[77] JA at 978-81, 1000-1001.
[78] JA at 978-81.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] JA at 20.
[83] JA at 1015-1033.

GRANTED ISSUE AND ARGUMENT

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

Summary of Argument

The Government made no use, either direct or derivative, of appellant's two immunized statements which were made after his grant of testimonial immunity. Appellant's immunized statements did not provide any information the Government did not already know, were "non-events" in the investigation, and no member of the prosecution was exposed to either immunized statement.

Standard of Review

"[W]hether the Government has shown, by a preponderance of the evidence, that it has based the accused's prosecution on sources independent of the immunized testimony is a preliminary question of fact."[84] This Honorable Court "will not overturn a military judge's resolution of that question unless it is clearly erroneous or is unsupported by the evidence."[85]

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[84] *United States v. Mapes*, 59 M.J. 60, 67 (C.A.A.F. 2003).

[85] *Id.* Appellant in his appeal and brief before this Honorable Court does not challenge any of the historical facts found by the military judge. JA at 1015-1026, ¶¶ 1-73. Appellant's assignment of error alleges clear error on the part of the military judge only as to his various conclusions regarding use of or exposure to the immunized statements. JA at 1028-33.

Law and Analysis

The Supreme Court has recognized the legitimate interest of the Government to compel a witness to provide testimony in derivation of the Fifth Amendment for investigatory purposes where the witness is provided complete testimonial immunity.[86]

Once an appellant has shown that he has "testified under a grant of immunity,"[87] the Government has the burden to prove that its evidence is not tainted by establishing that it "had an independent, legitimate source for the disputed evidence."[88] This requires not merely a "negation of taint," but an affirmative duty to show the legitimate, independent source of all evidence.[89]

The goal of testimonial immunity is to ensure that it "leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a grant of immunity."[90] To that end, it "extends not only to use of the information obtained but also to

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[86] *Kastigar*, 406 U.S. at 453. The military has formalized this authority in Rules for Court-Martial (hereinafter R.C.M.) 704, authorizing general court-martial convening authorities to grant testimonial immunity from the "use of testimony, statements, and any such information directly or indirectly derived from such testimony or statements by that person in a later court-martial," except for "[a] later court-martial for perjury, false swearing, making a false official statement, or failure to comply with an order to testify."

[87] *Id.* at 461.

[88] *Id.* at 460

[89] *Id.* at 460.

[90] *Id.* at 458-59.

derivative use."[91] The principle underlying this rule is that "the scope of the grant of immunity must be coextensive with the scope of the privilege;"[92] however, "[w]hile a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader."[93]

I. Defining the Immunized Statements

The threshold question in this case is which statements appellant made after the Government granted him immunity are protected pursuant to *Kastigar* ("immunized statements"). Implicit in the holding of *Kastigar* is the principle that testimonial immunity only protects statements the Government compels in derivation of the Fifth Amendment.[94] A statement made by an accused not compelled by the Government pursuant to the grant of immunity is therefore not protected from use or derivative use.

The Government acknowledges that both the December 21, 2005 sworn written statement[95] and the March 31, 2006 oral statement

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[91] *United States v. England*, 33 M.J. 37, 39 (C.M.A. 1991). Derivate use has been defined to include the decision to prosecute, altering an investigative strategy, and influencing the testimony of another witness. *See United States v. McGeeney*, 44 M.J. 418, 422-23 (C.A.A.F. 1997)(and cases cited therein).
[92] *Mapes*, 59 M.J. at 66-67.
[93] *Kastigar*, 406 U.S. at 453.
[94] *See, e.g., United States v. Smallwood*, 311 F. Supp.2d 535, 542 (E.D. Va. 2004)(noting that because the accused's statements were voluntary, and not compelled, the protections of *Kastigar* did not apply pursuant to the immunity statute).
[95] JA at 539.

made to SA Kim Jones[96] are "immunized statements" afforded the protection of *Kastigar*.[97]

The military judge correctly found that neither the October 20, 2006 nor the December 4, 2006 oral statements made to SA's Garcia and Whitfield are immunized statements.[98] The first was made during a completely unrelated investigation and was spontaneous on the part of appellant, while the second was spontaneously made prior to any questioning during the pre-interview in-processing.[99] Because these statements are not otherwise protected by the Fifth Amendment and were not compelled by the Government, they are not protected by *Kastigar* and are therefore not immunized statements.[100]

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[96] JA at 646-48.
[97] JA at 1029.
[98] *Id.*
[99] *See United States v. Lichtenhan*, 40 M.J. 466, 469 (C.M.A. 1994)("Spontaneous statements, even though incriminating, are not within the purview of Article 31.").
[100] Appellant does not argue before this Honorable Court as he did before the Army Court that the December 21, 2005 refusal to take a polygraph examination (JA 968), which had been included in the documents provided to 7th JMTC, is an immunized statement. The military judge correctly found that "consent or lack of consent to a polygraph examination is not a statement or information about the death of SGT Johnson. The refusal to take the polygraph examination was not compelled testimony, and it is not protected by the grant of testimonial immunity." (JA at 1029). *See also Doe v. United States*, 487 U.S. 201, 207 (1988)(explaining that the Fifth Amendment privilege "protects a person only against being incriminated by his own compelled testimonial communications," and that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose

Consequently, the only statements protected by appellant's grant of testimonial immunity pursuant to R.C.M. 704 and *Kastigar* are the December 21, 2005 sworn written statement and the March 31, 2006 oral statement to SA Kim Jones. These will be collectively referred to as the "immunized statements."

II. Use of the Immunized Statements

A. Direct Use

It is undisputed that the Government made no direct use of appellant's immunized statements. Neither statement nor any reference to either statement was provided to the 7th JMTC. The statements were not admitted or referred to during appellant's court-martial.[101] Consequently, no actual direct use was made of appellant's immunized statements during his court-martial and the 7th JMTC was never exposed to those statements.

B. Derivative Use

This Honorable Court looks to four factors (the *Mapes* factors) in evaluating whether the Government has made derivative use of immunized testimony:

> 1. Did the accused's immunized statement reveal anything which was not already known

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information."). Refusing to submit to a polygraph examination does not relate a factual assertion nor disclose information.

[101] Excluding the *Kastigar* hearing and related motions. The military judge specifically noted that the only members of 7th JMTC exposed to the statements were the two trial counsel responsible for the litigation of the *Kastigar* issue, and had no other participation in the court-martial or investigation. JA at 1031.

> to the Government by virtue of the accused's own pretrial statement?
> 2. Was the investigation against the accused completed prior to the immunized statement?
> 3. Had the decision to prosecute [the] accused been made prior to the immunized statement?
> 4. Did the trial counsel who had been exposed to the immunized testimony participate in the prosecution?[102]

This section will begin by addressing the alleged derivative use of appellant's immunized statements by analyzing each of the four *Mapes* factors, followed by a response to appellant's additional specific allegations of use.

1. First *Mapes* Factor:

In *United States v. England*, despite the decision to prosecute having not been made at the time of the immunized testimony, this Honorable Court found significant in determining no *Kastigar* violation that "the military judge made a specific finding of fact supported by the evidence of record that nothing was learned in the interview which might incriminate appellant or otherwise be used to his disadvantage."[103] This Court characterized that immunized interview as a "non-event" and noted that "[n]othing happened as a consequence of the interview."[104]

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[102] *Mapes*, 59 M.J. at 67 (*citing England*, 33 M.J. at 38-39).
[103] *England*, 33 M.J. at 39.
[104] *Id.*

Further, in *United States v. Gardner*,[105] this Honorable Court found that everything within the appellant's immunized testimony was already known to the Government by virtue of appellant's own pre-trial statement and the subsequent immunized testimony added nothing to the investigatory file.[106] This Court noted, "[t]o hold that, under the circumstances of this case, the prosecution of Gardner was barred would virtually transform use immunity into transactional immunity-a result which under *Kastigar* is not required in order to safeguard a witness' fifth-amendment privilege against self incrimination."[107]

Similarly, appellant's immunized statements here were a "non-event" in his investigation and prosecution and nothing happened as a consequence of the interviews. Appellant's March 31, 2006 statement merely reiterated what he had previously said in his pre-immunity statements on July 5, 2005 and August 10, 2005: that he was not a member of the Gangster Disciples and did not have information concerning SGT Johnson's death.[108] This statement provided no new information and the military judge correctly found it to be a "non-event in the investigation."[109]

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[105] 22 M.J. 28 (C.M.A. 1986).
[106] *Gardner*, 22 M.J. at 31.
[107] *Id.*
[108] *Compare* JA at 532-38 with 648.
[109] JA at 1030.

In reviewing appellant's December 21, 2005 immunized statement, the following chart shows which facts offered within that statement were already provided by appellant pre-immunity.

Dec 21, 2005 Statement[110]	Pre-Immunity Statements
"I helped SGT Johnson out of his own car."	"I tried to get him out of the car and couldn't...[w]e tried to get him out together and we couldn't...[t]hey helped us carry him up the stairs and we put him on his bed."[111]
"I know that he was wearing Timberlands..."	"I think he had on...boots..."[112]
"I know that he was wearing...a T-shirt..."	"I think he had on...a t-shirt."[113]
"...but I know that they were not clubbing clothes."	N/A
"...he had a shirt on, but I don't know what type or color it was."	"I think he had on...a t-shirt."[114]
"I thought he was drunk..."	N/A
"I didn't know what happened to him."	"Do you know where SGT Johnson was that night?...No."[115] "Do you know what happened to SGT Johnson Sunday night?...No."[116] "Do you know who beat SGT Johnson?...No."[117]
"I thought he went and had a[*sic*] some beers without me."	N/A. *But see* "he told me he was hurt...he looked like he had been in a fight...his bottom lip was bleeding...he told me he was hurting, but he was OK."[118]
"No, I didn't see PFC Norman."	"Was PFC Newell at the club that night?...No."[119] "I ran over to Bldg 3210 to get Norman and Newell and they weren't in their rooms."[120]

As the table makes clear, the only new facts appellant provided in his December 21, 2005 statement were that SGT

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[110] JA at 464, 539.
[111] JA at 537.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] JA at 533.
[116] *Id.*
[117] JA at 537.
[118] *Id.*
[119] JA at 533.
[120] JA at 537.

Johnson was specifically wearing Timberlands (as opposed to generally "boots"), SGT Johnson's clothes were not clubbing clothes, and appellant believed SGT Johnson was drunk and had gotten some beers without him. However, the Government already knew all of this information through other witnesses and was irrelevant to the investigation into SGT Johnson's death.

The Government was already aware that SGT Johnson was in particular wearing Timberlands by virtue of PVT Charris' August 10, 2005 statement. Further, the brand of shoe worn by SGT Johnson was irrelevant to the investigation and did not lead to any evidence against appellant.[121]

The Government was also already aware that SGT Johnson's clothes were not "clubbing clothes" by virtue of an interview with SPC Towanna Thomas on November 28, 2005.[122] Further, this characterization is readily apparent based on the description previously provided by appellant, was irrelevant to the investigation, and did not lead to any evidence against appellant.

Finally, that appellant subjectively believed SGT Johnson was drunk by virtue of having "had some beers without" him is

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[121] *See* JA at 675-76, 680. A number of SGT Johnson's boots were retrieved from his room in October 2005 and sent to USACIL for forensic testing, prior to appellant's grant of immunity. JA at 426, 428, 431. Appellant's DNA was not located on any of the boots. JA at 680.

[122] JA at 597.

irrelevant because CID already knew that SGT Johnson's condition did not result from alcohol consumption, but rather from being beaten as part of a gang initiation.[123] Appellant's subjective opinion did not alter the investigation in any manner nor lead to any evidence against him.

Taken as a whole, nothing within appellant's immunized statements affected the investigation in any manner. Appellant never discussed or admitted to being involved in the "jumping in" initiation nor to knowing any information concerning what actually happened to SGT Johnson.

The military judge was therefore correct in finding that "[n]o evidence was directly or indirectly derived" from appellant's statements, they "added nothing to the accused's pre-immunity statements," and "were a non-event in the investigation."[124] As appellant himself prefaced his December 21, 2005 statement, "[e]verything I said in my last statement was true. There is nothing more that I have to say pertaining to the death of SGT Johnson."[125]

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[123] JA at 1095-96. SGT Johnson's autopsy was completed on December 12, 2005, and determined the cause of death to be "multiple blunt force injuries reportedly sustained in a physical assault resulting in fatal injury to the heart and brain." Further, the autopsy concluded that SGT Johnson "was not under the pharmacological effect of drugs, including steroids or alcohol at the time of death." (JA at 1096).
[124] JA at 1030.
[125] JA at 539.

2. Second and Third *Mapes* Factors:

The Government acknowledges and the military judge correctly found that the investigation against appellant was not completed and the decision to prosecute appellant was not made prior to appellant's immunized statements.[126] However, neither of these factors is dispositive in this case.

First, as discussed in the preceding section, appellant's immunized statements had no impact on the investigation as they provided no new relevant information.

Secondly, as the military judge found, even in appellant's first prosecution the immunized statements "had no impact on the decision to prefer and refer charges."[127] CPT Jocelyn Stewart, the 21st TSC trial counsel during appellant's first court-martial, explained that she had not even seen the immunized statements prior to completing most of her work product in appellant's case, precluding the possibility that those statements impacted her analysis or drafting.[128]

Finally, the transfer of appellant's case to 7th JMTC mooted any issue involving either of these factors. The current prosecution team only reviewed the redacted case file and never reviewed the full CID file.[129] In addition, 7th JMTC conducted

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[126] JA at 1032.
[127] JA at 1031.
[128] JA at 134-35.
[129] JA at 257.

its own independent analysis of appellant's case and utilized its own independent charging strategy for appellant's court-martial.[130] Therefore, the fact that appellant's immunized statements occurred prior to 7th JMTC's completion of the investigation and decision to prosecute is not persuasive in evaluating whether derivative use was made of appellant's immunized statements.

3. Fourth *Mapes* Factor:

The trial counsel in appellant's case, CPT Grace, was never exposed to any of appellant's immunized statements or derivative evidence of his immunized statements. While he attended most of the court-martial of United States v. Hudson, neither PVT Charris nor appellant testified, and CPT Grace did not hear anything regarding any statements made by appellant or PVT Charris after 15 December 2005.[131] Further, when CPT Grace met with SA Bellafiore, he never reviewed the CID file.[132]

Appellant is correct in noting that CPT Grace was exposed to the 21st TSC Witness List,[133] the redacted original Article 32 investigation,[134] 21st TSC's charge sheets,[135] and the 21st TSC

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[130] JA at 1026.
[131] JA at 36, 48, 62.
[132] JA at 257.
[133] JA at 1009-11.
[134] JA at 498, 511-519, 522-23.
[135] JA at 491-497.

prosecution memorandum.[136] But, as the military judge correctly found, appellant's immunized statements had no impact on the charging decisions of 21st TSC, did not influence or impact the decisions or recommendations in the Article 32 investigation, and had "no impact on the decision to prefer and refer the charges."[137]

Because the immunized statements provided no new evidence nor led to the discovery of any additional witnesses, they could not have impacted the 21st TSC witness list or charge sheet that were provided to 7th JMTC. The original charges by 21st TSC were based on wholly separate evidence from appellant's immunized statements, as evidenced by the 21st TSC prosecution memorandum which does not list those statements as probative evidence.[138] This is supported by CPT Stewart's testimony that she never saw the immunized statements until after those documents were prepared.[139]

Because none of those documents were derived from appellant's immunized statements, CPT Grace's exposure to them is not a violation of *Kastigar* or the Fifth Amendment.

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[136] JA at 988-91.
[137] JA at 1031.
[138] JA at 988-91.
[139] JA at 134-35.

4. Discrepancies between Appellant's Immunized Statements, his Pre-Immunity Statements, and PVT Charris' Statements did not Result in Derivate Use.

Appellant's argument that the discrepancies between appellant's immunized statements describing SGT Johnson's attire and PVT Charris' description were used against him is without merit. First, appellant's pre-immunity descriptions already disagreed with PVT Charris' descriptions in the manner appellant points out.

Secondly, appellant's argument focuses not on what appellant did say in his immunized statement, but rather what he did not say: appellant did not describe the injuries sustained by SGT Johnson nor did he describe the color of the shirt.[140] Appellant ignores the basic legal principle that *Kastigar* only protects an accused from the use of statements actually made, not notional or theoretical statements.

Finally, appellant ignores the fact that PVT Charris' statements after appellant was granted immunity were redacted from the case file forwarded to 7th JMTC, and thus any inconsistency between those statements would have been unknown to the 7th JMTC and thus could not be used against him at his court-martial.[141]

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[140] Appellant's Brief (AB) at 18.

[141] Appellant does not allege on appeal that PVT Charris' statements made after appellant's grant of immunity were derivative evidence of immunity given to the appellant. As the

Appellant's argument that the differences between appellant's immunized and pre-immunity statements were used against him by virtue of CID concluding he was "not cooperating with them," "had not previously been entirely truthful with them," and "was hiding something"[142] is meritless. The significant differences between appellant's July 5, 2005 statement and his August 10, 2005 statement showed he had not been truthful to CID on at least one occasion. Additionally, CID had evidence before appellant's grant of immunity that appellant was actually, contrary to his assertions, present at the "jumping-in" ceremony and was a member of the gangster disciples.[143] Finally, and most tellingly, that 21st TSC chose to grant appellant testimonial immunity clearly indicates the Government at that time felt appellant was "not being entirely truthful" and "hiding something" by denying participating in the "jumping-in" or having knowledge regarding the death of SGT Johnson; otherwise, there would have been no reason for the Government to provide appellant immunity.

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original military judge in appellant's court-martial correctly found, "[k]knowledge by a co-accused of a grant of immunity by itself with no impermissible use of the immunized statements does not trigger the *Kastigar* protections." JA at 952.

[142] AB at 19.

[143] JA at 471-73.

5. Knowledge of Appellant's Immunized Statements did not Impact CID's Interviews of PVT Charris or other Witnesses

Appellant claims that SA Sanchez's interview of PVT Charris was influenced by appellant's immunized statement. Appellant does not point out, however, what facts in particular provided by him in his immunized statement could have influenced the questioning of PVT Charris, nor is it logically possible to do so. Appellant's argument is pure speculation and unsupported by the record.

Even more speculative is appellant's argument regarding any supposed "undocumented questioning" of PVT Charris, where appellant provides no reference to the record in support of his position that any such questioning occurred, nor its substance. Clearly, the Government is not required pursuant to *Kastigar* and its progeny to disprove derivative use of immunized statements in a hypothetical manner—what is prohibited is actual derivative use, not theoretical.

6. COL Mulligan's General Advice to the Trial Counsel was not Derived from Appellant's Immunized Statements

COL Mulligan's general advice to CPT Grace to look to the case of United States v. Billings for charging examples of gang related activity did not violate *Kastigar* or the Fifth Amendment. COL Mulligan did not provide case specific advice to CPT Grace based on his knowledge of appellant's case, and did not specify how it should be charged; he merely referred CPT

Grace to the Trial Counsel Assistance Program (TCAP) for actual support.[144]

COL Mulligan described his advice as the "general text-book answer,"[145] and specified that he "never gave him any advice on how to charge or, in fact, what to charge."[146] CPT Grace confirmed that the advice provided was "basically, 'look at US v. Billings,'"[147] and explained that after looking to that case he "didn't end up using that charge or anything similar to that charge."[148]

As the military judge concluded, "[g]etting information from mentors in the technical chain normally creates no problem and is normally a good thing," and despite it creating a "pipeline" from an individual exposed to the *Kastigar* material, the immunized statements "had no impact or influence on what COL Mulligan told CPT Grace."[149] Indeed, if appellant "had invoked his privilege against self-incrimination and not made either of the immunized statements, then the words in COL Mulligan's e-mails would have been the same."[150]

There is no fair reading of the advice COL Mulligan provided that could lead to a conclusion that it was influenced

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[144] JA at 978-81.
[145] JA at 77.
[146] JA at 78.
[147] JA at 41.
[148] JA at 41.
[149] JA at 1031.
[150] *Id.*

in any respect by what appellant provided in his immunized statements. The military judge's findings in that respect are consequently not clearly erroneous.

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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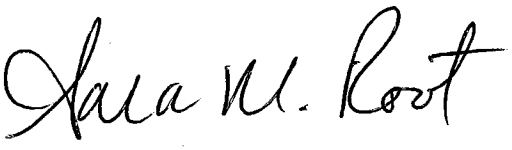

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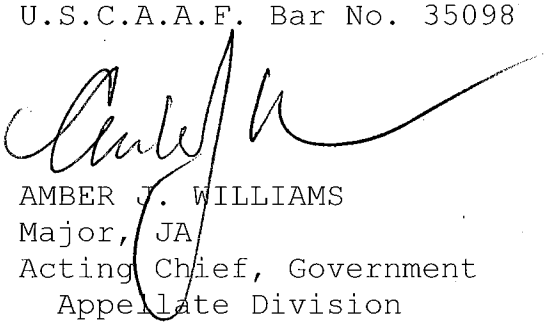

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