IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20080133
Specialist (E-5) **EVAN VELA,** United States Army, Appellant	)	USCA Dkt. No. 12-0194/AR

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee Sergeant (E-5), EVAN VELA United States Army, Appellant	)FINAL BRIEF ON BEHALF OF)APPELLANT))General Court Martial)Convened by the Commander,)Headquarters, Multi-National)Division)Center, Colonel R. Peter)Masterton, Military Judge)presiding)Tried at Camp Victory, Iraq)on 18,19 and 21 January and)10 February 2008.)))))))) Docket No. Army:) 20080133))) USCA Dkt. No.12-0194/AR

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE'S MOTION TO DISMISS OR DISQUALIFY UNDER UNITED STATES V. KASTIGAR.

II.

WHETHER THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT FINDINGS OF GUILTY TO CHARGE III.

STATEMENT OF STATUTORY JURISDICTION

This Court has jurisdiction to review this case pursuant to Article 67 (3), UCMJ.

STATEMENT OF THE CASE

Sergeant Evan Vela was convicted by an enlisted panel under Articles 118(2), 107, and 134 of the Uniform Code of Military Justice (hereinafter UCMJ), and 10 U.S.C. §§ 892, 907 and 934 (2008). The court-martial sentenced appellant to reduction to E1; forfeiture of all pay and allowances; confinement for 10 years; and a dishonorable discharge. The Convening Authority approved the sentence as adjudged, but waived the automatic forfeiture of all pay and allowances for a period of 6 months and credited Appellant 232 days of confinement against his ten year sentence.

Subsequently, SGT Vela appealed his conviction to the United States Army Court of Criminal Appeals. The appeals court denied relief, as to the issues below on October 13, 2011.

STATEMENT OF FACTS

SGT Evan Vela was a Ranger qualified-sniper assigned to the 1st Battalion, 501st Parachute Infantry Regiment sniper section of the battalion scout platoon. In October 2006, his unit deployed to forward operating base (FOB) Iskandariyah, Iraq, where it began operating out of the Jurf As-Sakhr district. (R. at 808, 869).

By early 2007, the battalion had lost nearly 25 soldiers. (R. at 874). By February, the battalion sergeant major replaced the old scout sniper platoon sergeant with Staff Sergeant Michael Hensley. (R. at 871, 873). The sergeant major told SSG Hensley that "he wanted to produce more kills and he felt that [SSG Hensley] was the guy that could make that happen." (R. at 871).

May 8, 2007

On May 8, 2007, the snipers received a mission to correct the obstructed view of a camera that was previously planted in the yard of a suspected insurgent. (R. at 874-878). After the mission, they provided over-watch of the houses in the area for a period of 48 hours. (R. at 879). The team spent all of May 9th in a hide site. (R. at 880-81). By the afternoon of May 9, 2007, SGT Vela had not slept since the beginning of the mission. (R. at 881). That night, the sniper team returned to the FOB with a platoon that had moved into the area to check some houses. (R. at 880-81).

Upon return to the FOB, the snipers began preparing for the next mission scheduled to begin later that night. (R. at 882). SSG Hensley allowed the snipers to go to sleep at 0300 hours. (R. at 883). At 0700 hours, SSG Hensley awoke the other members of his team to prepare for the next mission. (R. at 884). SSG Hensley testified that "[s]igns of battle fatigue [were] definitely setting in." (R. at 884).

That night, May 10th, at 2200 hours, the sniper team departed the FOB for its follow-on mission. (R. at 886). The team was comprised of SSG Hensley, SGT Vela, SGT Redfern, SGT Hand, and SPC Sandoval. (R. at 887). The team was not in place until approximately 0330 hours. (R. at 887). The mission was to occupy an over-watch position for a raid on a suspected insurgent's house where chemical rockets were believed to be hidden on an island in the river. (R. at 888). The soldiers spent the night watching from their positions through "thermals [and] NVGs." (R. at 889).

By sunrise on the 11th, the raid was completed, and SSG Hensley wanted to find a hide site to begin a rest cycle. (R. at 890). He found a trail near the coastline with a large berm and a pump house to hide inside. (R. at 890-91).

SGT Vela took the fourth watch, following SPC Sandoval. (R. at 957). During the change of the guard, SPC Sandoval handed SGT Vela a 9mm pistol. (R. at 957). During SGT Vela's watch, he fell asleep. (R. at 959-60). When he awoke, an Iraqi man was standing in front of him speaking in Arabic in a dangerous tone of voice. (R. at 959). SPC Sandoval awoke and told SGT Vela, who was in a daze, to point the pistol at the man. (R. at 960). Then, SPC Sandoval indicated to the man to squat down. (R. at 1086). The other snipers were then wakened. (R. at 960-61).

When SSG Henley woke-up, a local national was squatting in front of him with his hands up. (R. at 893). SSG Henley put the Iraqi's arms behind his back, pushed him down to the ground, and searched him. (R. at 894-895). The man began making noise - crying and yelling at times. (R. at 895). SSG Henley laid the Iraqi on the ground and placed the Iraqi's head-scarf covering over his eyes. (R. at 897). SSG Henley then placed SPC Sandoval, SGT Redfern, and SGT Hand in different locations around the berm and the nearby pump-house. (R. at 900).

At one point, SGT Redfern spotted a boy about 100 meters from their position and waved him over. (R. at 895-896). The boy was laid down under the head garment next to the man, later learned to be the boy's father. (R. at 897).

SSG Hensley testified that he then saw military-aged males to his west with a weapon. (R. at 899). He released the boy in the opposite direction because he "pretty much knew at that point that something was going to happen..." to the man. (R. at 899). SSG Hensley testified that nobody else knew what was going to happen. (R. at 901). SSG Hensley believed that the man was making too much noise for him to control, and that he was trying to lure insurgents to their hiding position. (R. at 900).

Before releasing the boy, SSG Hensley made four false radio transmissions, indicating that he saw a man 200 meters out

moving towards their position with a weapon, and that he needed permission to execute a "close kill." (R at 902).

At the time, SGT Vela was resting against the berm in a "Ranger flop." (R. at 900). SSG Hensley told SGT Vela to "pull out his 9mm pistol and prep it." (R. at 901). Then, SSG Hensley ordered SGT Vela to shoot. (R. at 903). If SGT Vela had not shot the man, SSG Hensley would have. (R. at 904). The body went into agonal seizures. (R. at 903). SSG Hensley ordered a 2nd shot, but it missed. (R. At 845, 903). SSG Hensley then pulled out an AK-47 and placed it on the body. (R. at 904).

SPC Sandoval and SSG Hensley were also charged with murder. On September 27, 2007, SGT Vela testified in *United States v. Sandoval*. (J.A., 57) On November 6, 2007, SGT Vela testified in *United States v. Hensley*. (J.A., 57).

SUMMARY OF THE ARGUMENT

Appellant is entitled relief because the military judge erred in denying the defense's motion to dismiss or disqualify under *Kastigar v. United States*, 406 U.S. 441 (1972). Furthermore, the evidence was legally insufficient to support findings of guilty to charge III (aiding and abetting the placing of an AK-47 on the deceased).

The United States Supreme Court and the Court of Appeals for the Armed Forces have vigilantly ensured that the government honors an American citizen's Fifth Amendment protection against self-incrimination. When the government prosecutes a previously immunized witness, it has the "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." So stringent is this burden, that "no testimony or other information compelled under the order or any information directly or indirectly derived from such testimony or other information may be used against the witness in any

criminal case." Accordingly, the government must "affirmatively prove that its evidence is derived from a legitimate source wholly independent of the compelled testimony."

Under *Kastigar*, a pretrial hearing is required, in which the prosecution must present all of the evidence intended for trial and identify the sources of that evidence to ensure that it was not derived from or based on the inadmissible compelled testimony. The failure of the government to meet its burden has consequences: when tainted evidence is introduced at trial the defendant is entitled to a new trial. There are similar protections against non-evidentiary uses of immunized testimony.

The evidence must be free from taint both directly and indirectly; non-evidentiary purposes include assistance in investigating, preparing witnesses, interpreting evidence, and general trial planning and strategy. The rationale behind this is that the accused should be left in the same position he was in before giving the immunized testimony.

In *Mapes*, the Court of Appeals for the Armed Forces outlined a series of four non-exclusive factors designed to help military judges analyze whether the evidence was obtained wholly independent of compelled testimony. These factors are: 1) Whether the immunized testimony revealed anything not already known to the government; 2) Whether the investigation was completed prior to the immunized testimony; 3) Whether the decision to prosecute was made prior to the immunized testimony; 4)Whether prosecutors exposed to the immunized testimony participated in the prosecution of appellant.

The evidence here failed the *Mapes* test in several aspects. Firstly, Appellant's immunized testimony revealed that SPC Sandoval was never in the hide site when the alleged victim was shot. That fact was contrary to the government's theory when SPC Sandoval was tried. Secondly, the investigation was not

completed prior to the immunized testimony as the government had not located the alleged victim's son yet, who was temporarily detained with the alleged victim. Thirdly, while the decision to prosecute was made prior to the immunized testimony, prosecutors may have been exposed to the testimony through a CID agent and witness interviews.

Furthermore, the evidence was legally insufficient to support findings of guilty to charge III. In Charge III, SGT Vela was found guilty of aiding and abetting the wrongful placing of an AK-47 with the remains of a dead Iraqi. However, that charge must fail because the evidence did not establish that the appellant (1) had a duty to interfere in the crime; (2) took an affirmative step in the crimes commission; and (3) was even aware that SSG Hensley, the person appellant allegedly aided and abetted, placed the weapon next to the dead Iraqi. On the contrary, SSG Hensley testified that he placed the AK-47 on the body, not SGT Vela. (R. at 904).

Appellant respectfully requests this Honorable Court to set aside the findings and sentence of the trial court or grant other appropriate relief.

I.

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION TO DISMISS OR DISQUALIFY UNDER UNITED STATES V. KASTIGAR.

Burden and Standard of Proof

The burden at trial was on the government to show, by a preponderance of the evidence that it had made no use, either directly or indirectly, of the immunized testimony given by SGT Vela in *United States v. SPC Jorge Sandoval* and *United States v. SSG Michael Hensley*. The question of whether the government met its burden is a preliminary question of fact that will not be overturned unless it is clearly erroneous or unsupported by the evidence. *United States v. Mapes*, 59 M.J. 60, 67 (C.A.A.F 2003). Because the burden is on the government, the appellate court "may not infer findings favorable to it on these questions." *See generally*, *United States v. Hampton*, 775 F. 2d 1479, 1485-86 (11th Cir. 1985).

Additional Facts

The military judge's findings of fact are at appellate exhibit (LXVII) of the record of trial. (J.A., 55). The military judge did not rule on the record. For brevity, the military judge answered each of the four *Mapes* factors in the negative. In some cases, as discussed below, his findings of fact were clearly erroneous. Brief summaries of the testimony at the Kastigar hearing are included below.

Testimony of Col. Allen

During the Kastigar hearing, COL Allen testified that he was the staff judge advocate (hereinafter SJA) for the 3rd Infantry Division and Multinational Division Center. (J.A., 148). His duties included advising the general court-martial convening authority. (*Id.*). He testified that he became aware

of the allegations against SGT Vela in June 2007. (J.A., 149). He recommended referral to a general court-martial on August 6, 2007. (J.A., 150).

COL Allen testified that he briefed the Convening Authority on the evidence and the decision to grant SGT Vela testimonial immunity. (J.A., 151-152). At the time of the decision, COL Allen told the convening authority that they would address any legal issues associated with granting immunity to the witness by "building the appropriate "Chinese wall" to separate the issues." (J.A., 152).

COL Allen testified that he personally directed personnel in his office to "seal the file and to seal the file for United States versus Vela, to include… all relevant materials for the prosecution Vela…" (J.A., 153). COL Allen also appointed new trial counsel (CPT Nef and CPT Young) and directed them to have no contact with the previous trial counsel (CPT Rykowski or CPT Haugh). (J.A., 154).

COL Allen conceded that he had engaged in tactical discussions with his trial counsel. (J.A., 161). He also had the following exchange with civilian defense counsel:

"Q. If CPT Nef was sitting within 3 feet of CPT Haugh when CPT Haugh was having discussions and witness interviews, was back consistent with the "Chinese wall" that the government had built?

A. I'm confident that wasn't happening… and I think they all fully understood that this wasn't a charade of creating a "Chinese wall" and saying we did a few things…" (Our underlined emphasis added). (J.A., 162-163).

Indeed, despite COL Allen assurances, the "Chinese wall" that the military had created was in fact a charade. The most telling testimony the COL Allen had created a "charade" of a Chinese wall occurred when COL Allen admitted that he advised

CID that there would potentially be a mental responsibility defense. (J.A., 166). Furthermore, COL Allen also had discussions with MAJ Kuhfahl about trial strategy. (J.A., 176). MAJ Kuhfahl was a senior prosecutor, who was brought into the Vela case after Appellant's testimony and the high-profile acquittals in *Sandoval* and *Hensley*.

Captain Jason Haugh

During the Kastigar hearing, CPT Haugh testified that his desk was approximately 3 feet from CPT Nef's desk in a cubicle. He interviewed SGT Hand in that cubicle, or in the cubicle next to their desk after immunity was granted. (J.A., 66). This is important because it constitutes an indirect non-evidentiary use of SGT Vela's immunized testimony by exposing CPT Nef to the information.

Captain Jason Nef

At the Kastigar hearing, CPT Nef testified that at the time he was detailed to the case, SGT Vela had not been granted testimonial immunity in Hensley or Sandoval. (J.A., 97). He testified that CPT Haugh mentioned that SGT Vela had testified in Sandoval's case. (J.A., 99). He also noted that CPT Young attended the trial of SPC Sandoval and listen to the testimony of a witness. (J.A., 113). CPT Young was not called as a witness, but provided an affidavit at Appellate Exhibit VIII in SGT Vela's trial.

Special Agent Mitchum

In a November 9, 2007 e-mail to Agent Cassada, Special Agent Mitchum related that he had learned that the lawyers from the SJA office thought that the defense would proffer an insanity defense. (J.A., 137). This e-mail came after SGT Vela had testified in the Sandoval case. SA Mitchum also spoke with CPT Rykowski about the substance of SGT Vela's testimony in *US*

v. Sandoval. (*Id.*). Finally, he discussed SGT Vela's testimony with other agents and read about it in the paper. (J.A., 141).

Argument

When the government prosecutes a previously immunized witness, it has the "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972); *see also United States v. Youngman*, 48 M.J. 123, 127 (C.A.A.F. 1998). So stringent is this burden, that "no testimony or other information compelled under the order or any information directly or indirectly derived from such testimony or other information may be used against the witness in any criminal case." *Kastigar*, 406 U.S. at 448-49 (1972). The United States Supreme Court and the Court of Appeals for the Armed Forces have vigilantly ensured that the government honors an American citizen's Fifth Amendment protection against self-incrimination. *Mapes*, 59 M.J. at 66-67. The government must "affirmatively prove that its evidence is derived from a legitimate source wholly independent of the compelled testimony." *Id.*, at 460.

In addition to the burden of showing that it has not derived any direct evidence from compelled testimony, it must also prove that it has not used compelled testimony for any indirect or non-evidentiary purposes. *United States v. Olivero*, 39 M.J. 246, 249 (C.M.A. 1994)(citing *United States v. Kimble*, 33 M.J. 284(C.M.A. 1991)). Non-evidentiary purposes include assistance in investigating, preparing witnesses, interpreting evidence, and general trial planning and strategy. *See United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973). The rationale behind this is that the accused should be left in the same position he was in before giving the immunized testimony. *Kastigar*, 406 U.S. at 454-55 (disagreeing with *Counselman v.*

Hitchcock, 142 U.S. 547, 584 (1892) and stating instead that the Federal immunity statute needed to place the immunized witness in the same position as if the witness had not testified); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964)(stating that the government must leave the witness in the same position that he was in before testifying).

Under *Kastigar*, a pretrial hearing is required, in which the prosecution must present all of the evidence intended for trial and identify the sources of that evidence to ensure that it was not derived from or based on the inadmissible compelled testimony. *Kastigar*, 406 U.S. at 460; *McDaniel*, 482 F.2d at 311; *see generally*, Goodman, Howard W., Grand Jury Practice, 10-44 - 10-56 (Law Journal Press, 2005).; *see also*, White Collar Crime: Fifth Survey of Law-Immunity, 26 Am. Crim. L. Rev. 1169, 1179, n.62 (1989).

A review of the evidence "must proceed witness by witness; if necessary, it will proceed line by line and item by item." *North*,910 F.2d at 872. In *Mapes*, the Court of Appeals for the Armed Forces noted that the prosecution may not indirectly do when it may not do directly. 59 M.J. at 69. In other words, it may not indirectly use evidence procured from an immunized witness to prosecute that witness.

In *Mapes*, the Court of Appeals for the Armed Forces outlined a series of four non-exclusive factors designed to help military judges analyze whether the evidence was obtained wholly independent of compelled testimony. These factors are:

1. Whether the immunized testimony revealed anything not already known to the government;

2. Whether the investigation was completed prior to the immunized testimony;

3. Whether the decision to prosecute was made prior to the immunized testimony;

4. Whether prosecutors exposed to the immunized testimony participated in the prosecution of appellant.

Mapes, 59 M.J. at 67. The failure of the government to meet its burden may have drastic consequences. When tainted evidence is introduced at trial the defendant is entitled to a new trial. *Id.*, at 71-72. Immunized witnesses are entitled to similar protections against non-evidentiary uses of immunized testimony. 26 Am. Crim. L. Rev. at 1179, n. 62.

Under *North*, unless every "i" is dotted and every "t" is crossed, the government has an almost insurmountable burden to demonstrate that the use of immunized testimony, no matter how indirect, has not been tainted by knowledge of the compelled testimony. *See North*, 910 F.2d at 872-73.

A. Deficiencies in the Kastigar Hearing

To satisfy the government's burden under Kastigar, the prosecution must present all of the evidence intended for trial and identify the sources of that evidence to ensure that it was not derived from or based on inadmissible compelled testimony. *Kastigar*, 406 U.S. at 458-60; *North*, 910 F.2d at 354. In the present case, the government did not call a single witness during the Kastigar hearing, though documentary evidence was submitted. COL Allen, CPT Nef, CPT Haugh, CPT Rykowski, and CPT Mitchum were the witnesses called during the hearing; they were called by the defense. They were all lawyers.

Although the DC circuit's opinions are not binding precedent in the Court of Appeals for the Armed Forces, the logic in *North* is quite pertinent.[1] This logic, that the review of evidence "must proceed witness by witness [... and] if

[1] The court made a successful effort to summarize much of the established law on Kastigar from many different jurisdictions.

necessary [...] line by line and item by item," conforms with the Supreme Court's concern in Kastigar that the witness be afforded, "protection against being 'forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" *Kastigar*, 406 U.S. at 453.

The government cannot satisfy its burden under *Kastigar* when it offers no substantive evidence other than Appellant's sworn statement to CID and relies on the defense to call the witnesses at the Kastigar hearing. The government's failure to bear its burden significantly prejudiced Appellant because 1) he cannot know which witnesses the government chose not to call because of his testimony, and 2) he will never know if his testimony was used to interview witnesses questioned by the government in preparation for trial. Most importantly, the government's failure to bear its burden at the hearing prejudices Appellant because it denies Appellant the security it promised him in granting him immunity, and it violates his Fifth Amendment right against self-incrimination.

B. Mapes Test - First Factor

The first factor in *Mapes* explores whether the immunized testimony revealed anything not already known to the government. In fact, the government used SGT Vela's testimony against him. 59 M.J. at 67.

Appellant's testimony in *Sandoval* was well-publicized and directly led to PFC Sandoval's acquittal of premeditated murder. (App. Ex. VII). Prior to Sgt. Vela's grant of immunity, the government charged SSG Hensley, Sgt. Vela, and SPC Sandoval with the May 11, 2007 shooting. Their theory was that SPC Sandoval was in the hide site at the time of the shooting and was the accomplice who gave SGT Vela the pistol. SGT Vela's immunized testimony

contradicted the government's theory and led to his high-profile acquittal.

As a result of SPC Sandoval's acquittal, and undoubtedly Vela's testimony, the government proceeded to trial in *United States v. Hensley* with a different, strengthened theory. This new theory was that SSG Hensley was the sole accomplice, and that he ordered the allegedly unlawful killing. Then, in government counsel's opening statement at appellant's trial, the prosecution stated, "it's only SGT Hensley, SGT Vela, and Ghani Al Janabi in the hide site." (R. at 638). The government learned this information from SGT Vela's immunized testimony. Prior to Sandoval's trial, that is, prior to Vela's testimony, the government would not have known this; indeed, its theory might have still been that all three soldiers were in the hide site at the time they tried SGT Vela had he not testified.

The government was in a better position as a result of SGT Vela's compelled testimony. They had the benefit of two prior trials in which appellant testified to refine their trial strategy against him. The government could have established the sufficiency of its evidence at the *Kastigar* hearing, but it failed to bear its burden; accordingly, the Appellant is entitled to a new trial. *See generally*, *Kastigar*, 406 U.S. 441; *North*, 910 F.2d at 854.

C. Non-evidentiary and tactical use

The spirit of the *Mapes* factors is to assess whether the government is placed in a better position as a result of the appellants immunized testimony. 59 M.J. at 67. In *Mapes*, similar to the case here, the court noted that the convening authority, the SJA, and the principal CID investigator were tainted by knowledge of the dual investigations. *Id.* In that case, attempts to establish a "Chinese wall" were ineffective to protect against compromise of the immunized testimony because

the prosecution used the testimony for non-evidentiary tactical purposes. *Id.* In truth, the *Mapes* test implies a fifth factor - tactical and non-evidentiary use of immunized testimony. This is consistent with *Kastigar*:

> the government must go further and affirmatively prove legitimate independent sources for its evidence and affirmatively establish that none of the evidence presented to the grand jury was derived directly *or indirectly* from the immunized testimony.

Kastigar, 406 U.S. at 458-60; *See also United States v. Byrd,* 765 F.2d 1524, 1530 (11th Cir. 1985). *Kastigar* emphasizes that "immunity from use and derivative use 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," 406 U.S. at 459.

In the present case, the government's attempts to establish a "Chinese wall" were ineffective to protect against compromise of the immunized testimony because it used the Appellant's testimony for non-evidentiary tactical purposes.

Firstly, the government used information learned from Appellant's twice-compelled testimony to reduce the premeditated murder charge to unpremeditated murder. Despite Appellant's apparent "benefit" from a reduced sentence, the government was doing no favors in reducing its burden of proof in anticipation of testimony regarding Appellant's mental state. Through the course of two trials, the government was able to refine its theory. While the prosecutors may not have been directly exposed to the immunized statements, they were indirectly exposed through CID agents like Special Agent Mitchum, who provided the link between COL Allen, CPT Rykowski, CPT Haugh, CPT Nef, CPT Young, and eventually MAJ Kuhfahl. They were indirectly exposed through strategic talks with COL Allen, who oversaw all three trials. (J.A., 161). Furthermore, CPT Young

was also at the Sandoval trial, and was most likely exposed to the immunized statements through the closing arguments and perhaps even witnessed the testimony.

Additionally, there was evidence that on November 9, 2007, after appellant had testified in *Sandoval*, an e-mail was sent to CID agents indicating that lawyers in the SJA's office believed the defense would proffer an insanity defense. (J.A., 137). CID was able to interview witnesses with an eye towards developing witness testimony and statements to contradict any claims that SGT Vela was too exhausted, dehydrated, or sleep arrived to possess the specific intent necessary to commit murder. CID agents would later discuss appellant's testimony with CPT Rykowski. (J.A., 137).

D. The Mapes Test - Second Factor

The second factor in *Mapes* explores whether the investigation was completed prior to the immunized testimony. 59 M.J. at 67. The military judge concluded that the investigation was completed prior to any immunized testimony. This conclusion is clearly erroneous. The government did not locate the boy detained in the hide site until after the *Sandoval* trial. The defense pointed this out in the Kastigar motion. (J.A., 8). Clearly, the investigation was ongoing. It did not end after Appellant's interrogation.

As Special Agent Mitchum noted, the government internally discussed the possibility of the mental responsibility defense. The military judge's findings at 12(b) that the immunized statements did not affect the investigation draws an impossible conclusion from the evidence as the government did not call any witnesses or demonstrate what they would offer a trial. (J.A., 58). Appellant was unfairly prejudiced because he could not anticipate the full extent to which the government indirectly

used his immunized testimony to interview witnesses to provide harmful testimony. He would not be in the same position.

E. The Mapes Test - Third Factor

The third *Mapes* factor explores whether the decision to prosecute was made prior to the immunized testimony. The purpose of this prong is not necessarily to determine whether the initial decision to prosecute was tainted by the immunized testimony, but also whether subsequent prosecutorial decisions were tainted by the immunized testimony.

The court itself was tainted by the prior two trials in which Appellant testified. Following the high-profile acquittals of Sandoval and Hensley, the Convening Authority refused to transfer jurisdiction to an unbiased Convening Authority. The Convening Authority discriminately denied defense requests for immunity for SVC Sandoval and SSG Hensley at the Article 32 Investigation. (J.A., 53). The Convening Authority also denied requested medical testing. (J.A., 52). Further, the Convening Authority reduced the charge from premeditated murder to unpremeditated murder to reduce the government's burden. (R. at 9). Prosecutorial decisions were being made on the basis of Appellant's immunized testimony and the results that his testimony produced in the *Sandoval* and *Hensley* trials.

F. The Mapes Test - Fourth Factor

The fourth factor asks whether prosecutors exposed to the immunized testimony participated in the prosecution of the appellant. Appellant concedes that this factor clearly weighs in the government's favor, as CPT Rykowski and CPT Haugh did not actively participate in SGT Vela's prosecution. However, COL

Allen's strategy discussions and advice do constitute an exposed prosecutor's participation.[2]

G. Conclusion

The "charade" that COL Allen designated a "Chinese wall" cannot even be described as a Chinese chain-link fence. In summary, the prosecutor (CPT Haugh) that cross-examined Appellant in two previous cases shared a cubicle with the new prosecutor in the Appellant's case (CPT Nef). CPT Haugh testified to conducting interviews of witnesses in the vicinity of CPT Nef. Furthermore, CPT Young attended the sound of all trial. The SJA lawyers discussed SGT Vela's prior testimony with CID special agents. These same CID special agents were called as witnesses against him. The SJA lawyers also discussed possible defenses with the CID agents prior to the completion of investigation in Vela's case.

The Convening Authority denied nearly every request made by the defense. Additionally, over 50% of the panel at Vela's court-martial worked in the same building as the SJA, knew the prosecutors, or was previously excused from companion cases. Contrary to COL Allen's testimony, the "Chinese wall" in *United States v. Vela* was indeed a charade. The government did not meet its burden at the Kastigar hearing; for this reason alone, the Appellant is entitled to relief.

II.

WHETHER THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY TO CHARGE III.

In Charge III, SGT Vela was accused of the following: (1)

[2] The *Mapes* test does not require that all the factors be satisfied to find that the government failed to meet its burden to avoid any taint of evidence by using immunized testimony against the witness.

the accused wrongfully placed an AK-47 with the remains of Ghani Nasr Khudayyer Al-Janabi; and (2) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces. (R. at 1338-39). Essentially, Appellant was found guilty of aiding and abetting the wrongful placing of an AK-47 with the remains of a dead Iraqi. (R. at 1339, 1404). However, that charge must fail because the evidence failed to establish that the appellant (1) had a duty to interfere in the crime; (2) took an affirmative step in the crimes commission; and (3) was even aware that SSG Hensley, the person appellant allegedly aided and abetted, placed the weapon next to the dead Iraqi.

Standard of Review

The standard of review for questions of both factual and legal sufficiency is *de novo*. *Ryder v. United States*, 515 U.S. 177, 187 (1995); *Weiss v. United States*, 510 U.S. 163, 168 (1993). The test for factual sufficiency is whether, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of this honorable court are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for legal sufficiency is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995), *cert. denied*, 116 S.Ct. 780 (1996)(quoting *Jackson v. Virginia*, 443 US 307, 319 (1979)).

A. Legal Sufficiency

In resolving questions of legal sufficiency, this court is "not limited to appellants narrow view of the record." *United*

States v. Cauley, 45 M.J. 393, 356 (C.A.A.F. 1996)(citing *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)). To the contrary, this court is bound to draw inferences from the evidence of record in favor of the prosecution. *McGinty*, 38 M.J. at 132; see also *Jackson*, 443 U.S. at 319; *United States v. Speer*, 40 M.J. 230, 232 (C.M.A. 1994).

In accordance with Article 134, UCMJ, in order to affirm a conviction for placing an AK-47 with the remains of Ghani Nasr Khudayyer Al Janabi, the government had to prove:

1) That at or near Jurf as-Sakhr, Iraq, on or about 11 May 21 2007, the accused wrongfully placed an AK-47 with the remains of Ghani Nasr Khudayyer Al-Janabi; and
2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces. (R. At 1338-39).

See Manual for Courts-Martial, United States, pt. IV, para. 60 (2008)[hereinafter MCM].

According to the Court of Appeals for the Armed Forces, the elements of aiding and abetting are:

1) The specific intent to facilitate the commission of a crime by another;
2) Guilty knowledge on the part of the accused;
3) That an offense was being committed by someone; and
4) That the accused assisted or participated in the commission of the offense.

United States v. Pritchett, 31 M.J. 213, 217 (C.M.A. 1990).

Appellant's mere presence at the scene of a crime, however, is not enough to establish that the appellant was an aider and a better. *Pritchett*, 31 M.J. at 217. To be an aider and abettor

requires that appellant take an affirmative step. *United States v. Thompson*, 50 M.J. 257, 259 (C.A.A.F. 1999). The law of aider and abettor is not a dragnet theory of complicity. Mere and active presence at the scene of the crime does not establish guilt. [Citation omitted]. Neither does later approval of the action supplier ground for conviction. *United States v. Jackson*, 19 C.M.R. 319, 327 (C.M.A. 1955).

Additionally, the government theory was that appellant aided and abetted SSG Hensley through inaction. According to trial counsel,

> [e]lements one into can be inferred from the accused statement where he states that Sgt. Hensley did not throne AK-47 down on the body. He knew it. Under the aiding and abetting theory, we believe there is an argument he concurred through his noncompliance or non-actions with those acts of Sgt. Hensley.

(R. at 838). However, to be found guilty of aiding and abetting through inaction, appellant must have been shown to have a duty to act. *United States v. Simmons*, 63 M.J. 89, 93 (C.A.A.F. 2006); *United States v. McCarthy*, 29 C.M.R. 574, 578 (C.M.A. 1960). In *McCarthy*, which is similar to appellant's case, McCarthy was a 1st lieutenant convicted of larceny and false official statement. 29 C.M.R. at 575-76. After a night of drinking with his buddies, McCarthy offered to drive the other members of his company back to Fort Knox. *Id.* at 576. McCarthy owned a car that was the butt of jokes in the company because it lacked hubcaps. *Id.* Other members of the company informed McCarthy that they were going to steal some hubcaps. They did so, over McCarthy's objection, and placed them in the backseat. *Id.* McCarthy made no overt motions to stop the crime. *Id.* The following day, McCarthy was questioned about the crime, and denied any knowledge of criminal activity. *Id.*

The then Court of Military Appeals found the evidence

insufficient to convict McCarthy of larceny as and aider and abettor. Id. at 578. The court found that "McCarthy's presence on the scene is not enough to show any concert of action" with the others involved. Id. Additionally, McCarthy's failure to take any affirmative steps to prevent the larceny could not be used to establish McCarthy's guilt. *Id.* Nor did McCarthy's transporting the thieves and hubcaps amount to aiding and abetting, although it may have made McCarthy and accessory after the fact. *Id.* The court concluded that "the mere failure of an officer to take active measures to prevent the commission of an offense in his presence does not permit the inference that he shared the criminal design of the actual perpetrators." *Id.*

In cases where the court found that an action did result in aiding and abetting, the accused had a proactive duty to report the activity or stop the offense. In *United States v. Ford*, a military policeman was guilty of aiding and abetting a larceny when he failed to properly report that a building was broken into, but rather informed other military policeman that the building was open and thus a target of opportunity for them. 30 C.M.R. 31, 33-34 (C.M.A. 1960).

In the present case, the government failed to establish that Appellant 1) took an affirmative step to aid SSG Hensley, and, furthermore, and 2) whether appellant had a duty to intervene.

The government's case fails to reach what the Court of Appeals found less than compelling in *United States v. Gosselin*, 62 M.J. 349 (C.A.A.F 2006). In *Gosselin*, the defendant pled guilty to wrongfully introducing psilocybin mushrooms onto an airbase. *Id.* at 350. Gosselin accompanied a fellow soldier to Maastricht because he wanted to purchase a Dragon statue there. Gosselin accompanied his colleague, who was looking for mushrooms, to some "head shops," where he purchased the

aforesaid Dragon. Id. Gosselin saw his cohort purchase mushrooms at one of the head shops, and admitted that he returned to the Air Force Base with his cohort and the mushrooms, with the cohort driving. *Id.* The military judge solicited admissions during the providence inquiry that Gosselin had a duty to interfere and tell the gate guard that the mushrooms were in the car. *Id.*, at 353. On appeal, he argued that he was neither the primary actor's supervisor, nor did he hold a special position that created a duty to interfere. *Id.*

In finding Gosselin's plea of guilty improvident, the Court noted that it "need not determine whether a duty existed in this case because even if there were a duty, it was not establish that Gosselin's noninterference was intended to act as aid or encouragement to" the primary actor. *Id.*, (citing *McCarthy*). Similarly in Vela's case, this court ought to find that the government failed to establish intent to associate himself with the venture. *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (quoting J. Learned Hand's opinion in *U.S. v. Peoni*, 100 F.2d 401).

In support of the theory that appellant aided and abetted in the commission of the offense, the government clearly relied upon appellant's inaction. *See* trial counsel's statement supra. Later, before the panel, grasping at straws, the government argued that the appellant was guilty because he "told the story he was supposed to tell. He helped maintain the story. He played right along." (R. at 1359).

The military judge, over defense's objection,[3] instructed on aiding and abetting in pertinent part as follows:

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[3] Trial defense counsel objected to the instruction because "there is no duty to report that a crime had been committed and even if there was, that's not aider and abettor liability." (R. At 1315).

> Presence at the scene of the crime is not enough nor is failure to prevent the commission of an offense; there must be in intent to aid or encourage the person who committed the crime. If the accused witnessed the commission of the crime and had a duty to interfere, but did not because he wanted to protect or encourage SSG Hensley, he is a principal. Although the accused must consciously share in the actual perpetrators criminal intent to be an aider and abettor, there is no requirement that the accused agree with, or even have knowledge of, the means by which the perpetrator is to carry out that criminal intent.

(R. at 1339-40).

However, as *McCarthy* makes clear, appellant had no duty to report SSG Hensley's offense. 29 M.J. at 578. He was not a barrack's supervisor, nor was he in a special position of trust - such as a military police position - that required reporting of such incidents. As the court stated in *McCarthy*, Appellant's failure to take active measures to prevent an offense committed in his presence does not permit the inference that he shared the criminal design. *Id.*

Furthermore, the fact that the government relied upon several possible theories does not save the conviction. When a panel is instructed on different theories of liability, and one of those theories is deficient, the verdict must be reversed. *Griffin v. United States*, 502 U.S. 46, 59 (1991); see also *United States v. Tomblin*, 46 F.3d 1369, 1385 (5th Cir. 1995); *Guevara v. State,* 191 S.W.3d 203, 208 (Tex. App. 2005) (aider and abettor theory inadequate where government claimed that Guevara had a duty to prevent victims death).

In the present case, the government relied upon several theories to establish appellant's guilt, and two of those theories were built upon erroneous foundations: firstly, the government failed to establish that SGT Vela had a duty to intervene, and, secondly, the government failed to establish

that SGT Vela took an affirmative step in the furtherance of the crime.

Conclusion

The military judge erred in denying the defense's motion to dismiss or disqualify under *United States v. Kastigar* . Furthermore, The evidence was legally and factually insufficient to support findings of guilty to charge III.

Therefore, appellant respectfully requests that this Honorable Court set aside the findings and sentence or grant other appropriate relief.

Respectfully submitted,
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Vela*, Crim.App.Dkt.No. 20080133, USCA Dkt. No. 12-0194/AR, was electronically filed with both the Court and Government Appellate Division on March 19, 2012.

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