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. 20080133
Sergeant (E-5) **EVAN VELA,** United States Army, Appellant	) USCA Dkt. No. 12-0194/AR

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

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (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]

Statement of the Case

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas,[3] of unpremeditated murder, making false official statements, and wrongfully placing an AK-47 on the remains of Ghani Al Janabi, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces, in violation of Articles 118, 107, and 134 of the Uniform Code of Military Justice (UCMJ).[4] The panel sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, confinement

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[1] Joint Appendix (JA) 1; UCMJ, art. 66(b), 10 U.S.C. § 866(b).
[2] UCMJ, art. 67(a)(3), 10 U.S.C. § 867(a)(3).
[3] JA 60.
[4] JA 205.

for ten years, and a dishonorable discharge.[5] The convening authority approved the adjudged sentence and credited appellant with 232 days of confinement against the sentence to confinement.[6] The Army Court affirmed the findings and sentence, except for that part of the sentence that included forfeiture of all pay and allowances.[7]

Statement of Facts

The Crimes

At 2300 hours on May 10, 2007, appellant and the rest of his five-man sniper team departed their patrol base for an over-watch mission in the town of Jurf ah-Sakhr, Iraq.[8] The team's mission was to provide security as Alpha Company conducted a search of the town below.[9] Alpha Company conducted their search and left the area without incident at approximately 0500 hours.[10]

At that time, Staff Sergeant (SSG) Michael Hensley, the sniper team leader, consolidated the team for a rest and refit

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[5] JA 206.
[6] Action.
[7] JA 1-2.
[8] Supplemental Joint Appendix (SJA) 53; Prosecution Exhibit (PE) 6 (PE 6 is appellant's June 24, 2007 type-written statement to CID, and is available at JA 39-43. But for the purposes of the statement of facts and Granted Issue II, the government will refer to PE 6 to show that this statement was introduced as substantive evidence on the merits).
[9] SJA 53. "Alpha" company is also referred to as "Apache" company at various places in the record. The Government will use "Alpha" company throughout this brief.
[10] SJA 55; 177.

cycle; one man pulling security, while the other four slept.[11] The other members of the sniper team were Sergeant (SGT) Robert Redfern, SGT Richard Hand, Specialist (SPC) Jorge Sandoval and appellant.[12]

That morning, while appellant was on guard duty, a local villager, Ghani Nasr Al Janabi, walked into the sniper team's hide-site.[13] Appellant did not see him walk in because appellant fell asleep.[14] Ghani Al Janabi began talking, which woke up SPC Sandoval.[15] SPC Sandoval woke appellant, and they woke the rest of the team.[16] Appellant had the team's pistol, and pointed it at Ghani Al Janabi.[17]

SGT Redfern immediately searched Ghani Al Janabi.[18] The villager was unarmed, and had only ID and money.[19] Shortly after, SSG Hensley put his knee into Ghani Al Janabi's back,

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[11] SJA 54-55.
[12] SJA 54.
[13] PE 6.
[14] SJA 189.
[15] SJA 189.
[16] PE 6, 7 (PE 7 is appellant's June 24, 2007 hand-written statement to CID, available at JA 44-45. The government will refer to PE 7 to show that it was introduced as evidence on the merits at trial); SJA 190.
[17] PE 6.
[18] SJA 57.
[19] SJA 57-58.

causing him to cry.[20] SSG Hensley again searched the villager, and bound his hands with 550 cord.[21]

About thirty minutes later, a young boy approached the hide-site.[22] The young boy was Mustafah Al Janabi, the son of the detained villager.[23] SGT Redfern called the boy into the hide-site, searched him, and placed him next to his father.[24] The boy was also unarmed.[25]

SSG Hensley then split up the sniper team.[26] He ordered SGT Redfern and SPC Sandoval to go to a nearby pump house to pull security.[27] SSG Hensley released the young boy, and sent him out of the hide-site.[28] Ghani Al Janabi, however, "wasn't going anywhere."[29] Only SSG Hensley, appellant, and Ghani Al Janabi remained in the hide-site.[30]

Over the next thirty minutes, SSG Hensley made four false radio calls back to their patrol base.[31] The purpose of the calls was to establish the legality of the kill that was about

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[20] PE 6.
[21] PE 6, 7.
[22] PE 7.
[23] SJA 94.
[24] SJA 61-62.
[25] SJA 61-62.
[26] SJA 63.
[27] SJA 63.
[28] PE 6.
[29] PE 6.
[30] PE 9 (PE 9 is appellant's June 25, 2007 type-written statement to CID, available at JA 48-50).
[31] PE 6, 7.

to happen.[32] During the calls, SSG Hensley lied and claimed they saw a military aged male carrying an AK-47 at 400 meters out, moving towards their position.[33] SSG Hensley requested permission for a close kill.[34] All along, Ghani Al Janabi was detained in the hide-site.[35]

Next, SSG Hensley untied the victim's hands, and adjusted the victim's headdress so that it covered his face.[36] SSG Hensley asked appellant "are you ready" and told him to "shoot."[37] Appellant did not question SSG Hensley, moved into position, and shot Ghani Al Janabi.[38] From six inches away, appellant put a single 9mm round into Ghani Al Janabi's head.[39] Ghani Al Janabi's body was convulsing, so SSG Hensley told appellant to "shoot him again."[40] Appellant fired his weapon, but missed.[41] SSG Hensley then took an AK-47 out of his ruck sack, and put it on the victim's body to make it look like a legitimate kill.[42] When the team returned from their May 11

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[32] SJA 154.
[33] PE 6, 7; SJA 139.
[34] PE 6.
[35] PE 6, 7, 9, SJA 154.
[36] PE 7.
[37] PE 6.
[38] SJA 156.
[39] PE 6, 9; SJA 156.
[40] PE 7.
[41] PE 7, 9, R. 844.
[42] SJA 158; PE 6. The evidence conflicted as to exactly whose ruck sack contained the AK-47. Appellant says it was SSG

mission, SSG Hensley created a false cover story, again, to make the kill look legitimate.[43]

Approximately six weeks later, two members of appellant's platoon reported they heard rumors that this was an unlawful kill.[44] Their superiors reported to CID, and CID began an investigation.[45] After first lying about the circumstances of the crime, appellant subsequently confessed to the murder in three separate statements to CID in June 2007.[46]

The Prosecution

On July 1, 2007, the government charged appellant with the murder of Ghani Al Janabi.[47] The government also prosecuted SSG Hensley and SPC Sandoval in connection with the May 11, 2007 incident. On September 19, 2007, the convening authority immunized appellant and ordered him to testify in United States v. Sandoval.[48] The Government served the grant of testimonial immunity on appellant on September 20, 2007.[49] Subsequently,

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Hensley's ruck. SSG Hensley claims it was SGT Redferns ruck. SJA 142.

[43] PE 6; SJA 144.

[44] R. 665.

[45] R. 665-66.

[46] JA 39-50.

[47] SJA 1 (Charge Sheet).

[48] JA 29.

[49] JA 28.

appellant was again immunized and ordered to testify in United States v. Hensley.[50] Appellant testified at both trials.[51]

A. Pre-Immunity

Before the convening authority immunized appellant, the prosecutors for appellant's court-martial were the same as the prosecutors for Hensley and Sandoval (CPT Sarah Rykowski and CPT Jeremy Haugh).[52] The legal advisor to the convening authority was COL Norman Allen (3ID SJA).[53]

On or about September 15, 2007, CPT Rykowski and CPT Haugh discussed with COL Allen the possibility of calling appellant to testify in Sandoval.[54] At that time, COL Allen ordered CPT Haugh and CPT Rykowski not to share any information SGT Vela might reveal in his immunized testimony with anyone in the office, including COL Allen, and the new prosecution team for

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[50] JA 274-275.
[51] AE 13, Encls. 17 (appellant's immunized testimony in Sandoval), 18 (appellant's immunized testimony in Hensley). The government's copies of these enclosures to AE 13 are very poor, and could not be reproduced legibly for the supplemental joint appendix. Therefore, the record cites to these exhibits will be to the original appellate exhibits.
[52] JA 66 (COL Allen testimony); JA 15 (CPT Rykowski Declaration).
[53] JA 61 (COL Allen testimony).
[54] JA 15 (CPT Rykowski Declaration).

appellant's case.[55] Both CPT Rykowski and CPT Haugh understood and followed COL Allen's orders.[56]

B. Post-Immunity

The convening authority granted appellant immunity on September 19, 2007, and on September 20 CPT Rykowski and CPT Haugh were removed from appellant's case.[57] Neither counsel took any further action as prosecutors in appellant's case.[58]

On September 25, 2007, the Government sealed the evidence in appellant's case.[59] The evidence consisted of the CID file, which included appellant's confessions and corroborating witness statements.[60] This is the same evidence the prosecution used at appellant's trial.[61]

On September 27, appellant testified in Sandoval.[62] Prior to appellant's testimony, however, COL Allen detailed two new prosecutors to appellant's case: CPT Jason Nef and CPT Cory Young.[63] COL Allen advised both trial counsel not to discuss the case with the Sandoval and Hensley prosecution team, and not to

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[55] JA 15 (CPT Rykowski Declaration); JA 67, 112 (COL Allen); JA 131, 275 (CPT Haugh); 328, 334 (CPT Rykowski).
[56] JA 15, 333 (CPT Rykowski); JA 68 (COL Allen); JA 139 (CPT Haugh).
[57] JA 15, 333.
[58] JA 15, JA 333 (CPT Rykowski); JA 140 (CPT Haugh).
[59] JA 66 (COL Allen); JA 15 (CPT Rykowski); JA 31 (Sealing Memo).
[60] JA 15; JA 156-157 (CPT Nef).
[61] JA 157.
[62] AE 13, Encl. 37, p. 458 (showing date of testimony was 27 September 2007).
[63] JA 67 (COL Allen); JA 152 (CPT Nef); JA 17 (CPT Young).

learn anything of appellant's testimony.[64] Both understood and followed the order carefully.[65]

Before appellant's trial, MAJ Charles Kuhfahl replaced CPT Young as trial counsel.[66] Neither CPT Rykowski nor CPT Haugh ever discussed any aspect of appellant's testimony in Sandoval or Hensley with MAJ Kuhfahl.[67]

Any additional facts necessary for the disposition of this case are set forth below.

ISSUE I

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

Summary of Argument

The Government made no use, either direct or derivative, of appellant's immunized testimony. Appellant's immunized testimony in Hensley and Sandoval provided no new information to the government, was a "non-event" in the investigation, and no member of the prosecution was exposed to the immunized testimony.

Standard of Review

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[64] JA 67 (COL Allen); JA 152 (CPT Nef); JA 17 (CPT Young).
[65] JA 154-155 (CPT Nef); JA 17 (CPT Young).
[66] JA 141 (CPT Haugh); JA 15 (Rykowski).
[67] JA 88 (COL Allen); JA 141, 143, 145 (CPT Haugh); JA 15 (CPT Rykowski).

"Whether 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."[68] 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."[69]

Law and Argument

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.[70]

Once an appellant has shown that he has "testified under a grant of immunity,"[71] 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."[72]

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[68] *United States v. Mapes*, 59 M.J. 60, 67 (C.A.A.F. 2003); *United States v. Morrissette*, 70 M.J. 431, 439 (C.A.A.F. 2012).
[69] *Mapes*, 59 M.J. at 67.
[70] *Kastigar v. United States*, 406 U.S. 441, 453 (1972). 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."
[71] *Id.* at 461.
[72] *Id.* at 460

This requires not merely a "negation of taint," but an affirmative duty to show the legitimate, independent source of all evidence.[73] The independent sources that "might undercut any taint would include actual facts on the ground...which would lead investigators to...make inquiries of potential witnesses."[74]

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."[75] To that end, the privilege "extends not only to use of the information obtained but also to derivative use."[76] This includes evidentiary and non-evidentiary uses, such as "the indirect use of testimony to alter the investigative strategy or to inform the decision to prosecute."[77]

The principle underlying this rule is that "the scope of the grant of immunity must be coextensive with the scope of the

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[73] *Id.* at 460.
[74] *United States v. Slough*, 641 F.3d 544, 554 (D.C. Cir. 2011).
[75] *Kastigar*, 406 U.S. at 458-59; *United States v. Allen*, 59 M.J. 478, 482 (C.A.A.F. 2004).
[76] *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).
[77] *Morrissette*, 70 M.J. at 438 (citing *Mapes*, 59 M.J. at 67 and *United States v. Hubbell*, 530 U.S. 27, 39 (2000)).

privilege;"[78] however, "[w]hile a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader."[79]

In *United States v. Mapes*, this Court detailed four factors to determine whether the evidence against appellant was independent of immunized testimony:

> 1. Did the accused's immunized statement reveal anything "which was not already known 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? and,
>
> 4. Did the trial counsel who had been exposed to the immunized testimony participate in the prosecution?[80]

Applying these principles, the military judge properly denied appellant's motion to dismiss or disqualify because the Government made no use - direct or indirect - of appellant's immunized testimony.

A. <u>The *Kastigar* Hearing</u>

In his brief, appellant first attacks the structure of the *Kastigar* hearing.[81] Without citing the record, he argues the government could not have met its burden because the government

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[78] *Mapes*, 59 M.J. at 66-67.
[79] *Kastigar*, 406 U.S. at 453.
[80] *Mapes*, 59 M.J. at 67 (citing *England*, 33 M.J. at 38-39 (C.M.A. 1991)).
[81] Appellant's Brief (AB) at 13.

"did not call a single witness during the *Kastigar* hearing."[82] Appellant's argument lacks any basis in the record. The government called COL Allen, CPT Nef, and CPT Rykowski as witnesses during the hearing.[83] Further, as evidence on the motion the government submitted affidavits from CPT Rykowski and CPT Young, CPT Young's Article 32 testimony, and the complete CID investigation.[84] Thus, appellant's argument that the government called no witnesses is wrong, contradicted by the record, and should be rejected by the Court.

B. First *Mapes* Factor

Appellant's immunized testimony in Sandoval and Hensley revealed nothing not already known to the Government. A comparison of appellant's immunized testimony and his sealed[85] pretrial statements shows they are substantially similar.[86] As the military judge properly noted, the only "new" information in the immunized testimony is that appellant claimed CID "changed"

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[82] AB at 13.
[83] JA 61 ("COLONEL NORMAN F.J. ALLEN III, US Army, was called as a witness for the prosecution, was sworn, and testified as follows"); JA 150 (CPT Nef)(same); JA 168-169 (CPT Rykowski)(same).
[84] JA 15, 17, 19-26; 186 (introduction of CID Report as AE XXIII for purposes of *Kastigar* motion). *See also United States v. Harloff*, 807 F.Supp 270, 283 (W.D.N.Y. 1992) (recognizing that the government can meet its evidentiary burden under *Kastigar* through non-conclusory affidavits); *United States v. Montoya*, 45 F.3d 1286, 1292 (9th Cir. 1995) (same).
[85] *See generally*, *United States v. Gardner*, 22 M.J. 28, 31 (C.M.A. 1986).
[86] *Compare* AE 13, Encls. 17, 18; with JA 39-50.

portions of his statement.[87] But appellant raised this same issue in his motion to suppress, and therefore waived any claim of privilege.[88] Moreover, appellant's testimony in Hensley is made up largely of denials and ambiguous answers.[89] Any claim of direct or indirect use of this kind of testimony is "untenable" because there is nothing to use.[90]

Despite these facts, appellant claims that from his immunized testimony the government learned that only "Sergeant Hensley, Sergeant Vela, and Ghani Al Janabi" were in the hide-site at the time of the murder. Appellant notes that in Sandoval, the government's theory was that SPC Sandoval was also in the hide-site when Ghani Al Janabi was murdered.[91] Appellant's theory on appeal is that his immunized testimony in Sandoval, that SPC Sandoval was not present, caused the government to change its theory in appellant's court-martial. Appellant's argument fails for two reasons.

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[87] AE 13, Encl. 17 at 700; AE 13, Encl. 18 at 93.
[88] SJA 4-20.
[89] AE 13, Encl. 18.
[90] *Harloff*, 807 F.Supp at 282 (citing *United States v. Gallo*, 863 F.2d 185, 190 (2d Cir. 1988)). *See, e.g.*, AE 13, Encl. 18 at 92-93 where appellant testified he didn't "recall anything happening in the hide-site between the time the man was being held in the hide-site and [] shooting the man." Appellant also stated he was unsure: if the detainee was secured; if the boy knew the detained man; what happened after the boy left; if SSG Hensley gave a situation report; if SSG Hensley ever searched the detained man.
[91] AB at 15.

First, appellant waived any claim of privilege to this information by twice discussing it in open court during his own court-martial. Appellant initially mentioned this during the motion to compel the immunized testimony of SSG Hensley, where appellant's counsel stated:

> "[T]here's two guys in the sniper site when Ghani Al-Janabi died. I don't understand how the government wouldn't want the only other witness [SSG Hensley] to testify."[92]

Subsequently, appellant's counsel again mentioned it during the *Kastigar* hearing while questioning CPT Haugh.[93] Indeed, the military judge informed appellant that he was waiving the privilege by discussing it in open court, in front of the prosecution team.[94] Because he openly discussed this information in court, in front of the prosecutors, appellant waived any privilege as to this fact.

The second reason appellant's argument fails is because this information was not new to the government, and was available from several sources in the sealed CID file. Notably, appellant himself previously provided this information in his

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[92] SJA 49.
[93] JA 126-127. *See also* AE 13, encl. 30 (Request for Grant of Iummunity and Oral Deposition for SGT Michael A. Hensley ICO United States v. SGT Evan Vela, dated December 7, 2007) (stating that "SGT Hensley is the only witness other than SGT Vela that saw what occurred on 11 May 2007 behind the berm near Route Patty in the Snadeej District of Jurf ah Sukhr, Iraq.").
[94] JA 126-127.

June 25, 2007 statement to CID.[95] It was also available in SGT Redfern's June 27, 2007 statement to CID.[96]

While appellant maintains that the government "refined" its theory of the case from Sandoval to Vela based on appellant's immunized testimony, the evidence belies that argument. Appellant's argument presumes that the prosecutors in his case knew the government's theory in Sandoval, and then changed course. But the evidence shows they had no knowledge of the government's case or theory in Sandoval, and instead developed independently the case against appellant. Differing theories from different prosecutors is not surprising. Moreover, since appellant's immunized testimony revealed nothing new, it could not have been the basis for any change in strategy even assuming

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[95] JA 49. In his statement appellant says SGT Hand was also in the hide-site but not in a position to see appellant or SSG Hensley because he was twelve feet away facing the opposite direction.

[96] JA 197 (This statement is available on AE XXIII (Classified Secret), but SGT Redfern's statement is not itself classified, and is included in Volume II of the record as part of the Article 32 investigation):

> Q: Who moved to the pump house?
> A: Myself and SPC Sandoval.
> ...
> Q: Where were SGT Hand, SSG Hensley, and SGT Vela at this point?
> A: SGT Hand was still in the upper backside portion of the hill. SSG Hensley and SGT Vela were on the other side of the hill opposite of Hand. The detainees were with SSG Hensley and SGT Vela.

that there was one. Accordingly, the first *Mapes* factor must cut in favor of the government.

C. Second *Mapes* Factor

The second *Mapes* Factor asks whether the government completed its investigation against appellant prior to his immunized testimony. CID completed all investigative activities by September 13, 2007; six days before immunity was granted (September 19, 2007),[97] and fourteen days before appellant testified for the first time (September 27, 2007).[98] Although the CID final report is dated October 3, 2007,[99] the only new item was an administrative index of the evidence gathered by September 13, 2007.[100]

Without citing any evidence or portion of the record, appellant claims the investigation was incomplete.[101] He argues that at the time he testified, the Government was still trying

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[97] JA 164-165; AE 23 (Vol. 11, Classified Secret); JA 28-29.
[98] JA 164-165; AE 13, Encl. 17 (appellant's immunized testimony in Sandoval); AE 13, Encl. 37, p. 458 (showing date of testimony in Sandoval was 27 September 2007).
[99] The final CID report is dated 3 October 2007, not 13 October 2007 as stated in the military judge's ruling. This appears to be a scrivener's error by the judge.
[100] *See* 3 OCT 07 Memorandum for Distribution, Subject: CID Report of Investigation - Final/SSI - 0039-2007-CID219-24712), available in hard copy in AE 23 (Classified Secret), and also on the classified compact disc, in Part 1 of 6. Page 8 of this memorandum shows the last investigative activity took place on September 13, 2007 (non-waivers of Article 31 rights by SGTs Hand and Redfern).
[101] AB at 17.

to locate a witness, Mustafah Ghani Al-Janabi, the boy in the hide-site and son of the victim.[102] Appellant offers no evidence to support that conclusion, and summarily concludes that because Mustafah did not testify in Sandoval, the Government used appellant's immunized testimony to locate Mustafah.[103] To the contrary, CID identified Mustafah on July 4, 2007, well before appellant's testimony.[104] And, since appellant's immunized testimony revealed no new facts about Mustafah or the crimes, the government could not have indirectly used appellant's testimony to assist in the investigation.

Separately, appellant also claims that the government made indirect use of his immunized testimony because "CID was able to interview witnesses with an eye towards developing witness testimony and statements to contradict" appellant's partial mental responsibility defense.[105] But CID did no such thing because their investigation was complete by September 13, 2007; two weeks before appellant testified in Sandoval. Additionally, there is substantial independent evidence in the record that

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[102] AB at 17 (citing JA 8-9).
[103] AB at 17 (citing JA 8-9).
[104] AE 13, encl. 4 (July 4, 2007 entry by Michael Silva: "Recorded data pertaining to KHUDAYER ALJANABI, Mustafa Abdulgani Naser"). *United States v. Rivieccio*, 919 F.2d 812, 815 (2d Cir. 1990) (rejecting claim that immunized testimony helped government identify or focus on a witness).
[105] AB at 17.

appellant might raise a mental responsibility defense.[106] Therefore, the government would have discovered this regardless of appellant's testimony.

In sum, the record shows the investigation was complete before appellant testified. This is not a case, like *Mapes*, where the criminal investigation was at an impasse prior to immunization.[107] Rather, the government had all the evidence it needed by September 13, 2007, two weeks before appellant ever made an immunized statement. This factor weighs heavily in favor of the government.

D. Third *Mapes* Factor

The convening authority originally referred appellant's case to a general court-martial on August 6, 2007, approximately one and a half months before his immunized testimony of September 27, 2007.[108] After appellant successfully withdrew his waiver of the Article 32 investigation, the charges were re-

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[106] JA 78, 83 (Testimony of COL Allen); In his September 15, 2007 request to the convening authority for an Article 32 investigation appellant argued: (1) he was suffering from post-traumatic stress-disorder (PTSD), nightmares, flashbacks, suicidal thoughts, and depression; (2) he was taking anti-psychotic medications; and (3) he was in an "altered state of mental health." SJA 193.

[107] *Mapes*, 59 M.J. at 62 ("Because of the investigative impasse, both Appellant and PVT Smoyer were given testimonial immunity on July 8."); *see also Morrissette*, 70 M.J. at 435 (describing investigative impasse).

[108] SJA 23.

referred on November 26, 2007 based on essentially the same evidence.[109] This factor also weighs in favor of the government.

E. Fourth *Mapes* Factor

The trial counsel exposed to appellant's immunized testimony did not participate in appellant's prosecution. COL Allen removed both CPT Rykowski and CPT Haugh from appellant's case well before the immunized testimony.[110] While apparently conceding this fact,[111] appellant still argues his prosecution team was exposed to the immunized testimony at several points.

First, appellant argues the new prosecution team was exposed to immunized testimony because CPT Nef "shared a cubicle" with CPT Haugh.[112] The record simply does not support appellant's theory. Even though they shared a cubicle, both CPT Haugh and CPT Nef were vigilant in ensuring they did not discuss the Hensley and Sandoval cases.[113] CPT Haugh never talked about appellant's immunized testimony when CPT Nef was present,[114] and CPT Nef never came across anything related to appellant's testimony.[115]

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[109] SJA 21, JA 70. The re-referral was based on the original evidence, plus the Vela Article 32 investigation.
[110] JA 15; JA 177.
[111] AB at 18.
[112] AB at 19.
[113] JA 135-136 (CPT Haugh); JA 155-157 (CPT Nef).
[114] JA 135 (CPT Haugh).
[115] JA 154-156 (CPT Nef). Additionally, appellant's argument that CPT Young was exposed to appellant's immunized testimony in

Next, appellant argues that COL Allen's participation in Vela "constitute[s] an exposed prosecutor's participation."[116] This argument is wrong for two reasons. First, it ignores COL Allen's explicit testimony that he was never exposed to - and deliberately avoided learning of - SGT Vela's immunized testimony.[117] Second, "simply arguing that the investigations overlapped does not answer the question of the existence of legitimate independent sources for all of the evidence."[118] There is no *per se* rule requiring COL Allen to withdraw in Vela, simply because he was the SJA in Sandoval and Hensley.[119] The question under *Kastigar* is whether the immunized testimony was in any way used to build a case against appellant.[120] Since COL Allen was never exposed to appellant's immunized testimony, it could not have been used to build the case.

Sandoval is completely contradicted by the record and the military judge's findings. AB at 16-17. First, CPT Young attended portions of Hensley, not Sandoval. Second, in CPT Young's Article 32 testimony, he clearly states that he only observed the testimony of three witnesses, and did not observe, opening, closing, appellant's testimony, or sentencing. JA 24.

[116] AB at 19.

[117] JA 68-69; 72; 104.

[118] *Montoya*, 45 F.3d at 1293.

[119] *Id.; see also United States v. Byrd*, 765 F.2d 1524, 1532 (11th Cir. 1985) (recognizing that in every case in which an immunized witness is subsequently prosecuted, the prosecutors may interact with law enforcement agents who have been exposed to immunized testimony); *Morrissette*, 70 M.J. at 439 (recognizing that there is no per se rule requiring withdrawal even if you have been exposed to immunized statements).

[120] *Montoya*, 45 F.3d at 1293.

The same analysis applies to Special Agent (SA) Mitchum.[121] Unlike COL Allen, SA Mitchum was indirectly exposed to the substance of appellant's immunized testimony in Sandoval through conversations with CPT Rykowski, and certain newspaper articles.[122] However, SA Mitchum was "100% sure" that he never discussed appellant's testimony with CPT Nef, CPT Young, MAJ Kuhfahl, or COL Allen.[123] Thus, even though SA Mitchum may have been a conduit for exposure,[124] none of appellant's immunized testimony passed from SA Mitchum to the prosecution team, and therefore did not contribute to the case. In short, no member of appellant's prosecution team was ever exposed to appellant's immunized testimony.

In sum, the military judge made no error when he determined appellant's prosecution was untainted by the immunized testimony. Appellant's testimony revealed nothing not already known to the government. The investigation was complete, and the decision to prosecute made at the time of immunization. And, no prosecutor was ever exposed to the immunized testimony. The government met its burden of proving independent source, and the purpose of testimonial immunity was served: the parties were

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[121] AB at 16.
[122] JA 194.
[123] JA 192, 196.
[124] *See, e.g., Morrissette*, 70 M.J. at 442.

left in substantially the same position as if appellant had remained silent.[125]

ISSUE II

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

Standard of Review

The standard of review for questions of legal sufficiency is *de novo*.[126]

Law and Argument

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."[127] In resolving questions of legal sufficiency, this Court is "not limited to appellant's narrow view of the record."[128] To the contrary, "this Court is bound to draw every inference from the evidence

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[125] *United States v. Allen*, 59 M.J. 478, 482 (C.A.A.F. 2004); *England*, 33 M.J. at 38.
[126] *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (citing *United States v. Green*, 68 M.J. 266, 268 (C.A.A.F. 2010)).
[127] *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995), *cert. denied*, 516 U.S. 1075 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (internal quotations omitted)).
[128] *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996) (citing *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)).

of record in favor of the prosecution."[129] Such a limited inquiry reflects the intent of this Court to "give[] full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."[130]

In order to affirm appellant's conviction under Article 134, UCMJ, for wrongfully planting an AK-47 on Ghani Al Janabi, this Court must find:

> (1) That at or near Jurf as Sakhr, Iraq, on or about 11 May 2007, appellant wrongfully placed an AK-47 with the remains of Ghani Nasr Al Janabi; and
>
> (2) That, under the circumstances, the conduct of appellant 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.

At trial, the Government argued appellant aided and abetted SSG Hensley in planting the AK-47 to cover up the murder.[131] To be guilty as a principal under an aiding and abetting theory, a person must: (1) assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel or command another in the commission of the offense; and (2) share in the criminal purpose of design.[132]

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[129] *McGinty*, 38 M.J. at 132 (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)).
[130] *Oliver*, 70 M.J. 64 (quoting *Jackson*, 443 U.S. at 319).
[131] R. 827, 1339, 1362.
[132] *United States v. Simmons*, 63 M.J. 89, 92 (C.A.A.F. 2006)(citing Manual for Courts-Martial, United States pt. IV,

Under an aiding and abetting theory, "all that is necessary is to show some affirmative participation which at least encourages the principal to commit the offense in all its elements defined by the statute."[133] Actual participation in the substantive crime is not required so long as the elements of aiding and abetting are established.[134] Appellant's conduct both before and after the offense and his companionship with the perpetrator are circumstances from which the appellant's participation,[135] and his intent,[136] can be inferred.

Applying these principles, the evidence against appellant including his conduct before and after the crime, proves beyond a reasonable doubt that he aided and abetted SSG Hensley in planting the AK-47.

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para. 1(b)(i), (ii)(2008 ed.)). *See also United States v. Mitchell*, 66 M.J. 176, 178 (C.A.A.F. 2008) (stating that liability under Article 77 requires: (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.

[133] *United States v. Pritchett*, 31 M.J. 213, 216 (C.M.A. 1990) (quoting *United States v. Knudson*, 14 M.J. 13, 15 (C.M.A. 1982)).

[134] *Id.*

[135] *United States v. Castonguay*, 1992 WL 42933 (A.F.C.M.R. 1992) (unpublished).

[136] *United States v. Gosselin*, 62 M.J. 349, 358 (C.A.A.F. 2006) (Crawford, J. dissenting) (citing *United States v. Barrett*, 12 C.M.R. 50 (C.M.A. 1953)).

A. Actus Reus: Encouraging Commission

The evidence at trial proved that appellant murdered Ghani Al Janabi in concert with SSG Hensley.[137] Appellant's active participation in the murder is a sufficient basis upon which a rational factfinder could conclude appellant encouraged SSG Hensley to plant the AK-47 as part of the cover up.[138] Appellant did not just spontaneously murder Ghani Al Janabi; the plan all along was to murder him and make it look like a legitimate kill. By murdering Ghani Al Janabi, appellant encouraged and assisted SSG Hensley by "setting the stage" for the eventual cover up.[139]

Appellant spends a large portion of his brief attacking the government's theory of aiding and abetting by inaction.[140] But the panel was instructed on theories of aiding and abetting by both action and inaction.[141] And, while the government's theory at trial is not entirely clear,[142] based on the evidence a

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[137] PE 6, 7, 9; R. 901-902.
[138] *United States v. Richards*, 56 M.J. 282, 285 (C.A.A.F. 2002) (appellant's active participation in previous assault of victim was a sufficient basis upon which a rational factfinder could conclude that appellant aided and abetted subsequent killing).
[139] *United States v. Shearer*, 44 M.J. 330, 334 (C.A.A.F. 2006) (finding sufficient evidence to prove appellant aided and abetted another in fleeing the scene of an accident because appellant, among other things, set the stage for the eventual flight from the scene by leading the retreat from accusers).
[140] AB at 22-23.
[141] AE LXII; R. 1339-1340.
[142] R. 1359-1362.

rational factfinder could conclude appellant affirmatively encouraged SSG Hensley in planting the AK-47.

B. Mens Rea: Specific intent to facilitate commission of the crime.

As to appellant's intent to plant the AK-47, these same facts provide a legally sufficient basis upon which the members could have inferred appellant acted with such intent.[143] Appellant was an active, voluntary participant in the murder of Ghani Al Janabi, and was part of a chain of events that led to the murder. In addition, appellant's conduct after the murder strengthens the finding of specific intent to plant the AK-47. Both appellant and SSG Hensley subsequently lied to CID about the murder.[144] The planted AK-47 was a critical piece of the cover story, and without which the plan could not succeed. Because the AK-47 was integral to appellant's cover story, a rational panel could find that appellant specifically intended to plant the AK-47.

C. Prejudice to good order and discipline or service discrediting.

In this case, the evidence is legally sufficient to prove that appellant's conduct was of a nature to bring discredit upon the armed forces. The purpose of planting the AK-47 on the

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[143] *Richards*, 56 M.J. at 285 (citing *United States v. Thompson*, 40 M.J. 257, 259 (C.A.A.F. 1999)).
[144] PE 6; SJA 144.

victim's body was to cover up the murder and make it look like a legitimate kill.[145] This fact alone is sufficient for a rational trier of fact to find beyond a reasonable doubt that appellant's conduct would have tended to bring discredit upon the service.[146] Even if that were not enough, the government introduced the testimony of Mustafah Al Janabi, to show that appellant's conduct actually did discredit the armed forces.[147] The evidence in this case was legally sufficient to prove all the elements of the Specification of Charge III.

In sum, the evidence in this case proves that appellant and SSG Hensley shared a concert of purpose in both the murder of Ghani Al Janabi and the cover up.[148] Viewing the evidence in the light most favorable to the Government, appellant's conviction is legally and factually sufficient and should be left

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[145] SJA 139, 154 ("TC: You were basically making these false transmissions because you were laying the ground work for the ultimate kill. W (SSG Hensley): Yes, sir.").
[146] *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011).
[147] SJA 99-100.
[148] *See, e.g., Richards*, 56 M.J. at 285. Appellant's reliance on *Griffin v. United States*, 502 U.S. 46 (1991), is misplaced. AB at 25. This case does not stand for appellant's stated proposition.

Conclusion

The Government respectfully requests this Court affirm the Army Court's decision, and approve the findings and sentence in this case.

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