IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellant v. Specialist (E-4) **PHILIP E. THOMPSON, JR.**, United States Army, Appellee	GOVERNMENT APPEAL AND BRIEF IN SUPPORT PURSUANT TO ARTICLE 62, UCMJ **Docket No. ARMY MISC 20220663** Tried at Fort Stewart, Georgia, on 13 April, 26 May, 26 August, and 28 November 2022, before a general court-martial, convened by the Commander, Fort Stewart, Colonel J. Harper Cook, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Issue Presented

WHETHER THE MILITARY JUDGE ERRED WHEN HE EXCLUDED ALL TESTIMONY OF SPECIAL AGENT [redacted] DUE TO HIS EXPOSURE TO AN IMMUNIZED STATEMENT OF THE ACCUSED

Statement of the Case

The accused/appellee[1] is charged with two specifications of murder, three specifications of accessory after the fact to murder, one specification of child endangerment, and one specification of conspiracy to commit aggravated assault,

[1] Given the procedural posture of this case, appellee will be referred to throughout this brief as "the accused."

in violation of Articles 118, 78, 134, and 81, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 878, 934, 881 [UCMJ].[2] On 29 November 2022 the military judge granted a defense motion in limine and excluded all testimony of Special Agent [redacted] (App. Ex. XLIII). On 1 December 2022, the military judge denied the government's request to reconsider his 29 November ruling. (App. Ex. XLVI). On the same day, the government filed notice of appeal under Rule for Courts-Martial (R.C.M.) 908. (App. Ex. XLVII).

Statement of Statutory Jurisdiction

The United States may file an interlocutory appeal of "[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." UCMJ art. 62(a)(1)(B). The test is "whether the military judge's ruling directly limited the pool of potential evidence that would be admissible at the court-martial." *United States v. Wuterich*, 67 M.J. 63, 75–76 (C.A.A.F. 2008). "The provisions of [Article 62] shall be liberally construed to effect its purposes." UCMJ art. 62(e). "Article 62, UCMJ, was patterned after its federal civilian counterpart[,] the Criminal Appeals Act, 18 U.S.C. § 3731," which "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Badders*, 82 M.J. 299, 304

[2] On 14 June 2022, the military judge granted the accused's motion to dismiss a separate conspiracy to commit murder specification for lack of jurisdiction. (App. Ex. XXII).

(C.A.A.F. 2022) (*quoting United States v. Wilson*, 420 U.S. 332, 337 (1975)) (internal quotation marks omitted).

In the present case, the military judge excluded all testimony of Special Agent [redacted] an Army Criminal Investigation Division (CID) special agent who interviewed the accused multiple times in the approximately two weeks after the murders. (App. Ex. XLI, pp. 2–3; App. Ex. XLII, p. 2). Special Agent [redacted] would testify that during the interviews in March 2017, the accused admitted to his involvement in the murders, including, *inter alia*, that he knew that the shooter had the intent to kill, that he had a plan with the shooter to gain entry into the apartment where the victims were, that he gained entry into the apartment and was present when the shooter shot and killed the two victims, and that the accused's son was in the accused's truck at the time of the shooting. (R. at 175–202). Especially given the liberal construction of Article 62, UCMJ, this court has jurisdiction over this appeal, because the exclusion of this evidence prevents the government from introducing "substantial proof" of "fact[s] material in the proceeding." UCMJ art. 62(a)(1)(B).

Statement of Facts

A. The accused's crimes

Among the charges against him, the accused is charged as a principal under an aiding and abetting theory to murdering Private (PV2) [redacted] and Specialist (SPC)

[redacted] on or about 5 March 2017. (Charge Sheet). The accused is alleged to have driven the shooter, Sergeant (SGT) [redacted][3] to the apartment where the victims were present, created a ruse[4] to gain entry and scope out the apartment, and created a way for SGT [redacted] to gain entry so that he could kill the occupants. (Charge Sheet; App. Ex. XLI(a), pp. 13–17).

B. CID Interviews

Special agents first interviewed the accused on or about 10 March 2017. (App. Ex. XLI, p. 2). That interview resulted in a sworn statement signed by the accused where he admits to driving SGT [redacted] to the apartments where the victims were, knowing that SGT [redacted] had a pistol, hearing a gunshot, but otherwise minimizing his role in the murders. (App. Ex. XLI(a), p. 1–12).

On 16 March 2017 into the overnight hours of 17 March 2017, CID conducted a polygraph and post-polygraph interviews with the accused. Special Agent [redacted] did not participate in the polygraph—one special agent conducted it

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[3] SGT [redacted] pleaded guilty to two specifications of premeditated murder, two specifications of obstructing justice, and one specification of violating a lawful order and is currently serving a life sentence in confinement. *United States v. Craig*, 2022 CCA LEXIS 639, at *2 (Army Ct. Crim. App. 3 Nov. 2022) (mem. op.), available at https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/693.

[4] The design of the ruse is that the accused would knock on the door to the apartment saying that he attended a party there the night before and believed he may have left a laptop at the apartment. (R. at 186). This would allow the accused to identify the occupants of the apartment and leave a door open or unlocked so that SGT [redacted] could enter behind him. (R. at 186).

while a different agent observed from another room. (App. Ex. XLI, p. 2; R. at 181). After the polygraph, the examiner took a break and then interviewed the accused again with the same agent observing. (App. Ex. XLI, p. 2). At some point, however, the accused requested to talk with Special Agent [redacted] who went in and interviewed the accused for approximately forty-five minutes to an hour. (App. Ex. XLI, pp. 2–3). The polygrapher and the other CID agent observed this interview. (App. Ex. XLI, p. 3). Neither the polygraph exam nor this post-polygraph interview was recorded due to CID policies at the time. (R. at 209).

After Special Agent [redacted] interviewed the accused, the accused requested to go outside to get some air. (App. Ex. XLI, p. 3; R. at 184). The accused, Special Agent [redacted] and the polygrapher all went outside of the CID building for approximately two hours. (App. Ex. XLI, p. 3). During this time, the accused provided the CID agents with a detailed account of his involvement in the murders. (App. Ex. XLI, p. 3). This interview was likewise not recorded. (R. at 209).

After returning inside, the polygrapher assisted the accused in preparing a sworn statement. (App. Ex. XLI, p. 3; App. Ex. XLI(a), pp. 13–17). The only portion of this interview that was recorded was when the accused swore to his statement. (R. at 209).

Special Agent [redacted] entered a case activity summary (CAS) on 17 March 2017 that summarized the interviews from 16–17 March. (App. Ex. XL(a), p. 2–

5). The CAS entry includes details about how the accused, at the direction of SGT [redacted] gained entry into the apartment by asking if he left his laptop there during a party the night before. (App. Ex. XL(a), p. 2). Additionally, Special Agent [redacted] sent an email to 3d Infantry Division leadership at 2337 on 16 March that included the following: "[The accused] admitted tonight he was aware of SGT [redacted] intent to murder the two victims, assisted with entrance into the house and witnessed both victims be shot and killed." (App. Ex. XLI(a), p. 51).

C. 2018 Article 39(a), UCMJ, hearing

During the accused's first trial,[5] Special Agent [redacted] testified at an Article 39(a), UCMJ, hearing on a motion to suppress. (App. Ex. XLI(a), pp. 18–41). The testimony revolved more around Special Agent [redacted] actions during the 16–17 March interviews than the content of the interviews themselves; however, Special Agent [redacted] did testify that the following occurred during the interview outside:

> So, he walked us through, you know, going to the back door, him and [redacted] decided he would go through the back door, the breezeway, check to see if it was locked. I remember him saying he checked to see if it was locked, but he got a little nervous because they could hear the noise, so he knocked. Cause he just got a little nervous, he didn't know if they would hear it and cause any issues. And then, that's when [PV2 [redacted] he believed, it was the guy with the blue shirt with the floral pattern, opened the door. He opened it just partially and [the accused] was asking about, you know, talking to him. He said "Hey, just come around the front." Which is the Rebecca Street side,

[5] *See United States v. Thompson*, 81 M.J. 824 (Army Ct. Crim. App. 2021).

> where the church is on. It's like the--if you want to, consider it the main street. So, [the accused] said he walked around and a guy opened the door, said "Come in." And, [the accused] came in, and that's when they—[the accused] said "Yeah, the party, they're missing a laptop." And so, he was just, kind of, walking us through missing a laptop, and then was on his phone, and the guy was looking for it and came back. So, we just went through all of that together.

(App. Ex. XLI(a), pp. 27–28). Additionally, on cross examination, Special Agent [redacted] testified that, based on the 9–10 March interviews, he believed that the accused's "primary function" in knocking on the door was to "get [SGT [redacted] into the residence." (App. Ex. XLI(a), p. 32).

D. Immunized interview

On 24 July 2019, the Commander, 3d Infantry Division and Fort Stewart granted testimonial immunity to the accused and ordered him to testify in the pending court-martial, *United States v. Craig.* (App. Ex. XL, p. 2). Between 10–11 September 2019, Special Agent [redacted] traveled to Fort Leavenworth with prosecutors from Fort Stewart[6] and SGT [redacted] trial defense counsel to interview the accused. (R. at 203, 207). No other CID agents or law enforcement officers attended these interviews. Special Agent [redacted] conducted the questioning of the accused, which lasted approximately eighteen hours over two days. (R. at 203,

[6] None of the prosecutors in the present case participated in the immunized interviews.

207). The interview was audio and video recorded. (R. at 207). No participants in the present case—including the military judge—have viewed or listened to the recordings from the immunized interviews. (App. Ex. XLII, p. 2).

E. Spillage[7]

On 10 November 2022, the current prosecution team interviewed Special Agent [redacted] in preparation for trial. During the interview, Special Agent [redacted] disclosed to the prosecution team that the accused had previously deflated the tires on the vehicles of SGT [redacted] wife and another soldier. (App. Ex. XLII, p. 2). On 16 November 2022, Special Agent [redacted] informed the prosecution team that he had, in fact, learned about the accused deflating the tires during the immunized interview and the disclosure had therefore been inadvertent. (App. Ex. XLI, p. 5). Special Agent [redacted] indicated that the fact about the tires was the only new fact he learned during the immunized interview. (App. Ex. XLI, p. 5).

F. Motion in limine

After the government disclosed the spillage to the accused's defense counsel, they filed a motion in limine seeking to "prohibit [Special Agent [redacted] from testifying at this trial because his anticipated testimony is tainted by his

[7] As used herein, the term "spillage" refers to the disclosure of information from the immunized interview. (*See* App. Ex. XLIII, p. 6).

substantial exposure to [the accused's] immunized statements." (App. Ex. XL, p. 1).

The military judge held an Article 39(a), UCMJ, hearing on the motion on 28 November 2022 [the "*Kastigar* hearing"]. Special Agent [redacted] testified at the hearing for approximately one hour and ten minutes and went into detail about what he learned from the accused during the March 2017 interviews, including how the accused and SGT [redacted] decided that the accused would gain entry into the apartment by saying that he left his laptop at the party the night before, (R. at 186); that the accused was inside and witnessed SGT [redacted] shoot the two victims, (R. at 189–92); that the accused went to a nearby church after the shooting, (R. at 195); that the accused left his two-year-old son in the truck while he went in the apartment, (R. at 193); and that the accused held a pistol at his house for SGT [redacted] after the shooting, (R. at 194).

The military judge issued a ruling granting the accused's motion in limine and excluding the testimony of Special Agent [redacted] in toto. (App. Ex. XLIII). In his ruling on the government's motion to reconsider, the military judge indicated that he was originally inclined to only exclude aspects of Special Agent [redacted] testimony, but the way he testified at the *Kastigar* hearing led him to determine that exclusion of all his testimony was necessary:

> [T]he Government asks that the court limit the exclusion solely to these terms ["plan," "decision," and "agreement],

> to conduct a more detailed analysis on each discrete aspect of allegedly tainted testimony, and to permit SA [redacted] to testify on untainted matters.
>
> The court was prepared to proceed in this fashion at the outset of this *Kastigar* litigation. However, SA [redacted] testimony and conduct on the stand made it clear to the court that such a detailed examination would not change the result. The court reasserts the broad findings that do not make this analysis required nor his testimony permissible:
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> (1) In context, his absolute denial that the immunized sessions "did not clarify anything … even a little bit" about the incident itself was not credible; so much so that the court finds the reverse to be true: that the immunized sessions did influence him, his knowledge of the case, and his ability to testify free from the taint of his exposure to the immunized sessions. and
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> (2) Not only is his anticipated testimony been so colored, so has his subjective belief that the non-immunized and non-"minimized" statements are the more accurate statements of the accused. At some immeasurable level, his belief stands to impact the factfinder indirectly in the form of his credibility on the stand. Stated another way, SA [redacted] presents as a confident witness, resolute that his testimony accurately reflects his memory. Yet, the Government has not disproven that his confident resoluteness is in any way the product of the immunized statements.

(App. Ex. XLVI, p. 3).

Standard of Review

"In an Article 62, UCMJ, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party

which prevailed at trial." *United States v. Henry*, 81 M.J. 91, 95 (C.A.A.F. 2021) (cleaned up). This court "may act only with respect to matters of law." *United States v. Baker*, 70 M.J. 283, 288 (C.A.A.F. 2011). "Regarding *Kastigar* issues, [the Court of Appeals for the Armed Forces (CAAF) has] held 'the military judge's use of incorrect legal principles . . . constitutes an abuse of discretion.'" *United States v. Mapes*, 59 M.J. 60, 69 (C.A.A.F. 2003) (alteration in original). "On questions of fact, [this] court is limited to determining whether the military judge's findings are clearly erroneous or unsupported by the record." *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995). "The question of 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." *Mapes*, 59 M.J. at 67.

Law

"The law relating to the use of immunized statements is well established." *Mapes*, 59 M.J. at 67. In general, the government cannot compel a person to make an incriminating statement. U.S. Const. amend. V; UCMJ art. 31; Mil. R. Evid. 301. That prohibition is not absolute, however. "Through a grant of immunity coextensive with the privilege against self-incrimination, the Government may require a person to make a statement that would otherwise be incriminating." *United States v. Allen*, 59 M.J. 478, 482 (C.A.A.F. 2004) (citing *United States v.*

Kastigar, 406 U.S. 441 (1972)). Military Rule of Evidence 301(d)(1) codifies this requirement; it prohibits, at a minimum, the use of the immunized testimony of a witness—and evidence derived therefrom—against that person, except in prosecutions for perjury, false official statement, false swearing, or failure to comply with an order to testify. *See also* R.C.M. 704(a)(2) ("A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial."). The CAAF has "construed 'use' to include non-evidentiary use such as the decision to prosecute." *Mapes*, 59 M.J. at 67 (citing *United States v. Olivero*, 39 MJ 246, 249 (C.M.A. 1994)). "[T]he Government may not use the testimony of a witness which was influenced by the immunized testimony." *United States v. McGeeney*, 44 M.J. 418, 422 (C.A.A.F. 1996) (citing *United States v. North*, 910 F.2d 843, 860 (D.C. Cir 1990) [*North I*], *modified in part*, 920 F.2d 940, 942 (D.C. Cir. 1990) [*North II*]).

"The underlying principle furthered by a grant of testimonial immunity is that the witness and the Government should be left 'in substantially the same position as if the witness had claimed [the] privilege [against self-incrimination].'" *Allen*, 59 M.J. at 482 (quoting *Murphy v. Waterfront Comm'n of New York*, 378 U.S. 52, 79 (1964), *overruled in part on other grounds* by *United States v. Balsys*, 524 U.S. 666, 687 (1998)) (alterations in original). In *Mapes*, the CAAF described

the principle as extracting a "quid pro quo" from the government in exchange for information compelled by a grant of immunity. 59 M.J. at 67. The "quid pro quo" has two aspects: (1) the government cannot use the information in any way to prosecute the person from whom it was compelled; and (2) "if challenged in court, [the government] must demonstrate that it has followed a process to ensure it has not exploited the compelled information." *Id.* "Under *Kastigar*, the Government has a 'heavy burden' to show non-use of immunized testimony. The Government must do more than negate the taint; it must affirmatively prove that its evidence 'is derived from a legitimate source wholly independent of the compelled testimony.'" *McGeeney*, 44 M.J. at 423 (quoting *Kastigar*, 406 U.S. at 460–61).

Argument

When it compelled the accused to provide information about SGT [redacted] under a grant of immunity, the government upheld its end of the bargain: it did not use that information against the accused; and it demonstrated in court that it followed a process to ensure that it did not exploit the compelled information. Accordingly, the military judge erred when he excluded the testimony of Special Agent [redacted] Even if portions of Special Agent [redacted] testimony were a result of his exposure to the accused's immunized interview, the military judge should have limited the exclusion to those aspects of Special Agent [redacted] testimony, and he erred when he excluded Special Agent [redacted] testimony entirely.

A. The military judge erred in finding that the government failed to carry its burden.

The military judge made multiple clearly erroneous findings of fact that were key to his decision-making process. These errors led to his ultimately erroneous conclusion that the government failed to demonstrate by a preponderance of the evidence that Special Agent [redacted] testimony was "derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460.

First, the military judge found that Special Agent [redacted] lacked the ability to segregate in his own mind the information he learned in 2017 from the information he learned during the 2019 immunized interview. (App. Ex. XLIII, p. 2). Such a conclusion is unsupported by the evidence in the record. While there is no denying that Special Agent [redacted] inadvertently disclosed the information about the accused deflating two soldiers' tires, that is the only evidence of any spillage from the immunized interviews. It is noteworthy—and demonstrates that he *can* segregate the interviews—that Special Agent [redacted] was the one that identified the spillage. Additionally, though, the matters to which Special Agent [redacted] testified at the *Kastigar* hearing are all consistent with, and supported by, independent evidence proving that he learned the information in 2017—years before the immunized interviews. Special Agent [redacted] testimony at the *Kastigar* hearing can be broken up into four broad categories regarding statements made by the accused during the

March 2017 interviews: (1) the accused knew of SGT [redacted] intent to kill the victims; (2) the accused knocked on the door and asked for a laptop so that SGT [redacted] could gain entry into the apartment; (3) the accused was present in the apartment when SGT [redacted] shot the victims; and (4) the accused's actions immediately following the shooting. Looking at each in turn, it is clear that Special Agent [redacted] learned the information to which he testified well before participating in the immunized interviews and therefore these matters were not derived from any immunized statements by the accused.

At the *Kastigar* hearing, Special Agent [redacted] testified that the accused told him SGT [redacted] said words to the effect of "these guys gotta go," and the accused knew that meant SGT [redacted] intended to kill the occupants of the apartment. (R. at 201). This is corroborated by the polygrapher's testimony at the *Kastigar* hearing. (R. at 169). Additionally, in the accused's 17 March sworn statement the accused said that SGT [redacted] made the statement immediately prior to pulling out a pistol. (R. at 13). Finally, in an email late on the night of 16 March, Special Agent [redacted] sent an email where he stated, "[The accused] admitted tonight he was aware of SGT [redacted] intent to murder the two victims, assisted with entrance into the house and witnessed both victims be shot and killed." (App. Ex. XLI(a), p. 51).

At the *Kastigar* hearing, Special Agent [redacted] testified that in March 2017 the accused told Special Agent [redacted] that he and SGT [redacted] were sitting in his truck

outside of the apartment complex when they decided that the accused would use the laptop ruse to gain entry into the apartment. (R. at 186). This is entirely consistent with Special Agent [redacted] testimony at the 2018 Article 39(a), UCMJ, hearing. *Supra*, pp. 6–7. The polygrapher also testified during the *Kastigar* hearing that the accused discussed receiving instructions from SGT [redacted] to ask about a laptop and included the same facts in his report about the March 2017 interviews. (R. at 169; App. Ex. XLI(a), p. 57). Additionally, in the accused's 17 March sworn statement, he states, "[SGT [redacted] tells me he wants me to go see if the back door to the apartment they were in was unlocked, and if it was I should go in and ask them if left a laptop." (App. Ex. XLI(a), p. 13). Special Agent [redacted] email on the night of the 16th also indicates that the accused admitted on that night that he assisted SGT [redacted] with entrance into the residence. (App. Ex. XLI(a), p. 51). Finally, Special Agent [redacted] CAS entry from 16 March 2017 contains this same information. (App. Ex. XL(a), p.2).

At the *Kastigar* hearing, Special Agent [redacted] testified that during the March 2017 interviews, the accused told Special Agent [redacted] that he was present in the apartment when SGT [redacted] shot the victims. (R. at 190–92). This testimony is consistent with the polygrapher's testimony, (R. at 174); the polygrapher's report, (App. Ex. XLI(a), p. 59); Special Agent [redacted] 16 March 2017 CAS entry, (App. Ex. XL(a), pp. 2–3); Special Agent [redacted] prior Article 39(a), UCMJ, testimony,

(App. Ex. XLI(a), p. 10); Special Agent [redacted] 16 March 2017 email, (App. Ex. XLI(a), p. 51); and finally the accused's 17 March 2017 sworn statement, (App. Ex. XLI(a), pp. 13–14).

With respect to the accused's actions after the shooting, Special Agent [redacted] testified at the *Kastigar* hearing that in the March 2017 interviews, the accused told Special Agent [redacted] that he went to the church, walked back to his truck where his son had been waiting, took SGT [redacted] Glock pistol and stored it at his house, and then left his house with SGT [redacted] (R. at 192–195). Like the remainder of his testimony at the *Kastigar* hearing, this evidence is contained in numerous independent sources that well pre-date the immunized interviews. This same information is contained in the accused's 17 March sworn statement, (App. Ex. XLI(a), p. 14); the polygraph report, (App. Ex. XLI(a), p. 57); and Special Agent [redacted] CAS entry from 16 March 2017,[8] (App. Ex. XL(a), p. 2).

Considering the above, it is clear that Special Agent [redacted] learned the matters to which he testified from the accused during the March 2017 CID interviews—just as he said he did. In other words, the independent evidence demonstrates that Special Agent [redacted] was able to correctly distinguish in his own mind the information he learned in 2017 from the information he learned during the

[8] The CAS entry does not include that SGT [redacted] gave the accused his Glock pistol to store.

immunized 2019 interviews. When the military judge concluded otherwise, he ignored the substantial evidence that supported Special Agent [redacted] assertions. The military judge's finding was simply not supported by the evidence in the record and was therefore clearly erroneous.[9]

The military judge also erred when he found that Special Agent [redacted] use of the terms "plan," "decision," and "agreement" when describing how the accused and SGT [redacted] gained entry into the apartment was a "material change from what the Government had 'canned' from 9–17 March [2017]."[10] (App. Ex. XLIII, p. 3). The military judge appears to acknowledge that "[t]he law does not require that a witness use the same words or syntax when relating testimony," (App. Ex. XLIII, p. 5, n.9); however, he then proceeds to require that Special Agent [redacted] have "use[d] the same words or syntax when relating testimony." *Aiken v. United*

[9] In addition, SA [redacted] testified that the accused's minimization of his own role during the immunized interview made him more confident that the prior version of events relayed by the accused was more accurate. (R. at 210). In his findings, the military judge took issue with this comment and used them in support of reaching one of his findings. (App. Ex. XLIII, p. 3). Of course, the military judge's concerns about SA [redacted] comment presuppose that SA [redacted] *can* distinguish between the 2017 and the 2019 statements. It is inconsistent for the military judge to find that he is unable to distinguish between them and then rely on that very distinguishment to support another finding of fact.

[10] The term "canned" is used by the D.C. Circuit in *North I* to describe materials that are sealed prior to a person being exposed to immunized testimony. *North I*, 910 F.2d at 871. The military judge seems to use the term more generally to materials that are memorialized or documented prior to being exposed to immunized testimony.

States, 30 A.3d 127, 142 (D.C. Cir. 2011). The independent evidence supporting Special Agent [redacted] *Kastigar* hearing testimony demonstrates that his use of those terms at the hearing was little more than a different choice of words—and well short of a "material change" demonstrating some impermissible taint.

In his 16 March 2017 CAS entry, for example, Special Agent [redacted] states that the accused told the polygrapher that "SGT [redacted] told him to knock on SPC [MB's] door and tell them he left a laptop at the residence from the party the night before to be able to get access to the residence." (App. Ex. XL(a), p. 2). The CAS entry provides that the accused then described how he did precisely that. (App. Ex. XL(a), p. 2). In typing his CAS entry, Special Agent [redacted] could have relayed the same information in a slightly different manner if he had said that SGT [redacted] came up with a *plan* to gain entry and then the accused executed that *plan*. Similarly, Special Agent [redacted] could have said that SGT [redacted] and the accused *decided* together to use the laptop ruse to gain entry into the apartment. Yet another way to say the same thing is that SGT [redacted] gave the accused instructions and the accused *agreed* to do what he instructed. None of these is a material change from any other.

Perhaps even more directly on point, later in the CAS entry, Special Agent [redacted] describes how outside of the CID building, "[the accused] proceeded to explain and act out the actions conducted in preparation for entrance into SPC

Brown's residence." (App. Ex. XL(a), p. 4). The exact same information can be conveyed by replacing the words "actions conducted in preparation" with the word "plan." It is hardly a change at all, but it is certainly not a material one.

Additionally, Special Agent [redacted] used "decided" in his 2018 Article 39(a), UCMJ, testimony when describing how the accused and SGT [redacted] got into the apartment. (App. Ex. XLI(a), p. 27). The military judge acknowledges this fact, yet he reaches the conclusion that it "merely highlights doubt" as to whether Special Agent [redacted] used "plan," "decision," and "agreement" when testifying at the *Kastigar* hearing because the accused used those words during the 2019 immunized interviews. One thing that cannot be doubted, however, is that Special Agent [redacted] characterized the laptop ruse as a "decision" by the accused and SGT [redacted] well before the immunized interviews. Accordingly, his use of that term and two others that, in context, are all but interchangeable, simply cannot be attributed to some taint from exposure to those interviews. Nothing in the record suggests that his choice of language was "shaped, directly or indirectly, by compelled testimony." *North II*, 920 F.2d at 942. Accordingly, the military judge's finding is unsupported by the record and is clearly erroneous.

Finally, the military judge's finding "that the immunized sessions did influence [Special Agent [redacted] his knowledge of the case, and his ability to testify free from the taint of his exposure to the immunized sessions" was clearly

erroneous because it was based on a misunderstanding or misinterpretation of Special Agent [redacted] testimony. (App. Ex. XLIII, p. 3). In the paragraph announcing this finding, the military judge cites what he perceived as a contradiction in Special Agent [redacted] testimony: "Without prompting for the content of the immunized statements, SA [redacted] revealed that the accused had 'minimized' his involvement; but then he contradicted himself, stating that the accused's version of the 'incident itself' had not changed." (App. Ex. XLIII, p. 3). This, however, misstates Special Agent [redacted] testimony. In fact, Special Agent [redacted] testified that "the incident itself, nothing changed *except for to adjust fire on what he had told me* [sic]." (R. at 208) (emphasis added). Later, Special Agent [redacted] elaborated that "the incident itself, he adjusted to minimize a lot of things." (R. at 208). Thus, Special Agent [redacted] did not contradict himself at all. The military judge, however, used the perceived contradiction to support his conclusion that Special Agent [redacted] testimony lacked credibility. (App. Ex. XLIII, p. 3). This conclusion, which was based on an erroneous view of the testimony, was itself clearly erroneous.

Each of the three of these findings was clearly erroneous. The military judge relied on these findings to support his ultimate conclusion that the government failed to carry its *Kastigar* burden. Thus, that conclusion must, too, be clearly erroneous.

B. Even if the government failed to carry its burden, the military judge should have narrowed the scope of the exclusion of Special Agent [redacted] testimony.

Simply put, the military judge used a hatchet when a scalpel would do.[11] In denying the government's motion to reconsider, the military judge indicated that he was at first inclined to limit the exclusion of Special Agent [redacted] testimony to any use of the terms "plan," "agreement," or "decision," and that he was open to "conduct a more detailed analysis on each discrete aspect of allegedly tainted testimony, and to permit SA [redacted] to testify on untainted matters." (App. Ex. XLVI, p. 3). The military judge, however, determined that a detailed analysis would be futile after hearing Special Agent [redacted] testimony at the *Kastigar* hearing. (App. Ex. XLVI, p. 3). This determination was based on an erroneous finding of fact and a misapplication of the law. Even if the military judge found that aspects of Special Agent [redacted] expected testimony were tainted—for instance the use of the specific terms "plan," "agreement," or "decision,"—the military judge could have excluded only those aspects of the testimony while still preserving the accused's constitutional rights.

To support his decision not to conduct a more detailed analysis of tainted testimony, the military judge first reasserted his finding that "[i]n context, Special

[11] Assuming, *arguendo*, that any of SA [redacted] testimony needs to be excluded at all.

Agent [redacted] absolute denial that the immunized sessions 'did not clarify anything . . . even a little bit' about the incident itself was not credible; so much so that the court finds the reverse to be true . . . ." (App. Ex. XLVI, p. 3) (third alteration in original). As discussed *supra*, pp. 20–21, this conclusion was based on a mischaracterization of Special Agent [redacted] testimony and was clearly erroneous. Accordingly, it cannot serve as a legitimate basis to exclude Special Agent [redacted] testimony entirely.

Additionally, the military judge based his decision to not conduct a more detailed analysis on the following finding:

> Not only is Special Agent [redacted] anticipated testimony been so colored, so has his subjective belief that the non-immunized and non-"minimized" statements are the more accurate statements of the accused. At some immeasurable level, his belief stands to impact the factfinder indirectly in the form of his credibility on the stand. Stated another way, SA [redacted] presents as a confident witness, resolute that his testimony accurately reflects his memory. Yet, the Government has not disproven that his confident resoluteness is in any way the product of the immunized statements.

(App. Ex. XLVI, p.3). In doing so, the military judge imposed an unnecessary and impermissible burden on the government, far beyond what is required by *Kastigar* and its progeny.

The burden on the government to demonstrate that it is not impermissibly using compelled testimony against an accused is clear and well established.

"Under *Kastigar*, the Government has a 'heavy burden' to show non-use of immunized testimony. The Government must do more than negate the taint; it must affirmatively prove that its evidence 'is derived from a legitimate source wholly independent of the compelled testimony.'" *McGeeney*, 44 M.J. 423. On top of this requirement, however, the military judge added an additional burden to prove that a witness's confidence in his own testimony is not a result of being exposed to immunized testimony. Such a requirement is unworkable and unsupported by the law.

The military judge found it problematic that Special Agent [redacted] participation in the immunized interviews made him subjectively believe that the accused's 2017 version of events was more accurate than the version relayed during the 2019 immunized interview. (App. Ex. XLIII, p. 5). As the military judge correctly pointed out, however, the factfinder would not be allowed to consider Special Agent [redacted] subjective beliefs as to how truthful he thought the accused was being. (App. Ex. XLIII, p. 5). Instead, the military judge believed that his subjective belief may manifest itself in Special Agent [redacted] appearing more confident on the stand. (App. Ex. XLIII, p. 5; App. Ex. XLVI, p. 3). There is, of course, no way to prove this—as the military judge states, it's "immeasurable." (App. Ex. XLIII, p. 5; App. Ex. XLVI, p. 3). Likewise, then, there is no way to disprove this. A requirement to "disprove[] that [a witness's] confident

resoluteness is in any way the product of the immunized statements" would, contrary to the holding in *Kastigar*, create an all-out bar on any witness testifying that had ever been exposed to immunized testimony—or at least one that "presents as a confident witness, resolute that his testimony accurately reflects his memory." (App. Ex. XLVI, p. 3).

Neither of the military judge's stated bases support his decision not to conduct a detailed analysis of the proffered testimony and limit the exclusion to those portions that the government failed to prove were derived from independent sources by a preponderance of the evidence. In the present case, there is overwhelming evidence that Special Agent [redacted] learned the information to which he testified at the *Kastigar* hearing from the 2017 CID interviews with the accused. Even assuming the government failed to carry its burden with respect to the terms "plan," "agreement," or "decision," limiting the exclusion to these terms would have adequately protected the accused's rights. As the D.C. Circuit Court of Appeals has explained, "*North I* requires the court to segregate tainted parts of the evidence from those parts that either could not have been tainted (because there is no overlap) or were shown to be untainted by a preponderance of the evidence." *United States v. Slough*, 641 F.3d 544, 550 (2011) (citing *North I*, 910 F.2d at 872). The military judge declined to do so in the present case, and that decision

was based on an erroneous finding of fact and a misapplication of the law. Accordingly, the military judge erred, and his ruling should be vacated.

Conclusion

WHEREFORE, the United States respectfully requests this honorable court grant its appeal and vacate the military judge's ruling.

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CERTIFICATE OF SERVICE, U.S. v. THOMPSON (Misc 20220663)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 9th day of January, 2023.

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