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STATE OF MARYLAND

Plaintiff

v.

GARRETT MILLER

Defendant

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IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No. 115141034

2016 JUN 29 PM 1:08

CIRCUIT COURT
BALTIMORE CITY
CRIMINAL DIVISION

* * * * *

MOTION FOR KASTIGAR HEARING

Now comes Defendant, Garrett Miller, by undersigned counsel, and files this Motion for a Hearing pursuant to *Kastigar v. United States* and for reasons states:

STATEMENT OF FACTS

Officer Garret Miller was indicted on May 21, 2015 on four charges: assault-second degree, two counts of misconduct in office and reckless endangerment. On April 21, 2016 he was served with an Order, signed by this Honorable Court, compelling his testimony as a witness in the trials of Officer Edward Nero and Lt. Brian Rice. Officer Miller's trial is scheduled to begin on July 27, 2016. Officer Miller was called as a witness by the State in *State v. Nero* on May 16, 2016. Officer Miller only testified pursuant to a grant of immunity from the State, he would not have testified if not for this Honorable Court's order requiring him to do so. It is anticipated that Officer Miller will be called as a witness in *State v. Rice* and will again be compelled to testify under a grant of immunity.

In anticipation of Officer Miller's trial, the State assigned two new prosecutors to prosecute this case, specifically, Assistant State's Attorney Lisa Phelps and Assistant

State's Attorney Sara David. Until the assignment of these two new prosecutors, Officer Miller was being prosecuted by Assistant State's Attorney Schatzow and Assistant State's Attorney Bledsoe and their team of attorneys. Mr. Schatzow and Ms. Bledsoe led the prosecution of Officer Nero and are therefore cognizant of the immunized testimony offered by Officer Miller. Mr. Schatzow and Ms. Bledsoe are prosecuting Lt. Rice, and will therefore be exposed to Officer Miller's immunized testimony yet again.

Following the assignment of the "taint team," undersigned counsel was informed that Assistant State's Attorney Kristen Blumer would be the liaison to this "taint team." Undersigned counsel was directed to send all correspondence to Assistant State's Attorney Blumer and to have no direct contact with the "taint team." It is the understanding of counsel that despite the assignment of a new prosecution team, Mr. Schatzow and Ms. Bledsoe continue to direct the prosecution of Officer Miller.

LEGAL ARGUMENT

If some part of the Indictment is based on specified unlawful activity that the State can establish is not covered by the immunity conferred on the Defendant, the Indictment must nevertheless be dismissed if the investigation or grand jury presentation of this matter relied directly or indirectly upon information furnished by the Defendant under grant of immunity. The Eleventh Circuit for the United States Court of Appeals has clearly described the procedure that must be followed in making this determination as follows:

Once a defendant shows that he has testified under immunity, the prosecution has the burden of showing that its evidence is not tainted; this

is done by establishing the existence of an independent source for the disputed evidence.

To establish a “wholly independent” source, the government must demonstrate that each step of the investigative chain through which the evidence was obtained is tainted. This includes the affirmative showing that none of the evidence presented to the grand jury was derived directly or indirectly from the immunized testimony...The protection against self-incrimination is violated whenever the prosecution presents a witness whose testimony is shaped – directly or indirectly – by immunized testimony, regardless of how or by whom the witness was exposed to that testimony. Prohibited indirect derivation includes using immunized testimony to shape the questioning of another witness. A government agent’s denials that he made use of the immunized testimony, standing alone, are generally insufficient to meet the government’s burden, even if made in good faith.

United States v. Schmidgall, 35 F.3d 1523, 1528 (11th Cir. 1994).

Such an approach has been given accord by all circuits of the United States Courts of Appeals. When the government decides to prosecute a previously “use immunized” witness, the Court must hold a so-called *Kastigar* hearing to demand that the government demonstrate that all its evidence came from sources independent of the compelled testimony. The government bears “the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.” *United States v. Harris*, 973 F.2d 333 (4th Cir. 1994) citing *Kastigar v. United States*, 406 U.S. at 461-62, 92 S.Ct. at 1665.

Courts have interpreted this passage to require the government to make its proof by preponderance of the evidence. See, e.g. *United States v. North*, 910 F.2d 843, 854, modified in part, 920 F.2d 940 (D.C. Cir. 1990) cert. denied __ U.S. ___, 111 S.Ct. 2235, 114 LEd. 2d 477(1991). It is not legitimate for the government to alter its investigatory strategy as a result of the immunized statement. As the Court states in

Kastigar, “This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an ‘investigatory lead’, and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosure.” 406 U.S. at 460, 92 S.Ct. at 1664. The Court must make specific findings on the independent nature of the allegedly untainted evidence. See *United States v. Rinaldi*, 808 F.2d 1579, 1584 (D.C. Cir. 1987). When the Court uses correct legal principles, its taint determination is a factual finding subject to review under the clearly erroneous standard. *United States v. Jones*, 542 F.2d 186, 199 (4th Cir. 1976), cert. denied, 426 U.S. 922, 96 S.Ct. 2629, 49 LED. 2d 375 (1976).

The application of this protection is not unique to federal witnesses who find themselves the subject of a federal investigation. Constitutional privilege against self-incrimination protects a state witness against incrimination under federal, as well as state law, and a federal witness against incrimination under state, as well as federal law. *Murphy v. Waterfront Commission*, 378 U.S. 52, 76, 84 S.Ct. 1594, 1608 (1964). In *Malloy v. Hogan*, the Supreme Court held that the Fifth Amendment privilege applied to the states through the due process clause of the Fourteenth Amendment. 378 U.S. 1, 3, 84 S.Ct. 1489, 1490, 12 LED 2d. 653 (1964). In Maryland, the protection of a witness from the State’s use of immunized testimony is also protected by the Maryland Declaration of Rights. Article 22 grants the same privilege against compulsory self-incrimination. The Court of Appeals has consistently construed Article 22 to be **in pari materia** with the Fifth Amendment. *Richardson v. State*, 285 Md. 261, 265, 401 A.2d 1021 (1979). Thus, Article 22 provides protection identical to that provided by the Fifth Amendment

privilege. *In re Criminal Investigation No. 1-162*, 307 Md. 674, n.3, 516 A. 2d 976, n.3 (1988). Not unlike its federal counterpart, the State bears the burden to establish an independent source of information utilized for the purpose of the State investigation. In any subsequent prosecution of the witness, the State has the burden of demonstrating that the evidence is derived from a source wholly independent of the compelled testimony, *Id.* n.4.

In summation, the State must bear this burden in regard to an investigation, grand jury proceeding or the prosecution of the witness, as is the case here. The State is subject to the requirements articulated by the Court in *Kastigar*. This *Kastigar* hearing must go through the investigative steps, the presentation to the grand jury and the evidence to be presented at trial item by item to determine its derivation. *United States v. Hampton*, 775 F.2d 1479 (11th Cir. 1985), See also, *United States v. Harris*, 973 F.2d 333 (4th Cir. 1992). At this hearing, “[e]ach step of the investigation chain by which the evidence presented was obtained must be documented or accounted for.” *Id.* at 1490. Among the government’s burdens at this hearing are the showing that it did not use any immunized information directly, that it did not use any immunized statement to help shape the investigation or questioning of others, *United States v. Carpenter*, 611 F. Supp. 768, 779 (N.D. Ga. 1985), that it did not obtain cooperation of the witnesses through use of the immunized statements, *Hampton*, 775 F.2d at 1487, and that it did not rely on reports or information provided by law enforcement officers who relied upon the immunized statements directly or indirectly, *Hampton* at 1491 n. 53, further “[u]nless the government relies solely upon evidence obtained prior to the immunized testimony...the principles of

Kastigar generally require (as a practical matter) a showing that prosecuting officials and their agents were aware of the immunity problem and followed reliable procedures for segregating the immunized testimony and its fruits from officials pursuing any subsequent investigation. *Id.*, at 1490. The clear question for this Honorable Court, is whether this was done in a sufficient manner in the case at hand.

In order to properly determine the direct or indirect use made of the immunized statements, it will be necessary for the State to disclose every step taken during the preparation of the prosecution's case. A hearing is required in which each prosecutor involved in the investigation, preparation and prosecution of Officer Miller's case should be required to testify. In order to assure the protection from any taint, a prosecutor from an agency other than the Baltimore City State's Attorney's Office should represent the State at the hearing.

WHEREFORE, the Defendant respectfully requests that this Honorable Court:

- A. Schedule a hearing in this matter;
- B. For such other and further relief as the nature of his cause may require.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2016 a copy of the foregoing Motion was hand-delivered to the Office of the State's Attorney for Baltimore City, 120 East Baltimore Street, Baltimore, Maryland 21202.


Catherine Flynn