

STATE OF MARYLAND

v.

GARRETT MILLER

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IN THE

CIRCUIT COURT FOR  
BALTIMORE CITY

CASE No. 115141034

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CIRCUIT COURT  
BALTIMORE CITY

CRIMINAL DIVISION

**STATE'S RESPONSE TO MOTION FOR A *KASTIGAR* HEARING**

Now comes the State of Maryland, by and through Marilyn J. Mosby, the State's Attorney for Baltimore City; Lisa Phelps, Assistant State's Attorney for Baltimore City and Sarah R. David, Assistant State's Attorney for Baltimore City; and files the State's Response to Defendant's Motion for a *Kastigar* Hearing.

**STATEMENT OF FACTS**

Officer Garrett 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, Officer Miller was served with an Order, signed by this Honorable Court, compelling his testimony as a witness in the *State of Maryland vs. Edward Nero*, 115141033, and *State of Maryland vs. Brian Rice*, 115141035. Officer Miller testified as a State's witness in *State of Maryland vs. Edward Nero*, on May 16, 2016, after being granted derivative use immunity by the Court based on a motion from the State's Attorney for Baltimore City.

To ensure that Officer Miller's Fifth Amendment rights will be protected in his upcoming trial, the State's Attorney's Office took special steps in preparing his prosecution. The State's Attorney appointed two prosecutors, Assistant State's Attorney Lisa Phelps and Assistant State's Attorney Sarah David and Law Clerk Ridgway Mills (the "clean team") to prosecute Officer Miller. The clean team was instructed not to watch any news coverage of any trials involving the testimony of Officer Miller, not to discuss the testimony of Officer Miller and to take precautions to ensure that they would not be exposed to Officer Miller's immunized testimony.

The State's Attorney's Office also assigned a "filter team" led by Assistant State's Attorney Kristin Blumer, who was tasked with ensuring that the clean team was not exposed to any immunized testimony during the clean team's trial preparation. The filter team screened evidence reviewed by the clean team; interviewed witnesses before they interviewed with the clean team; reviewed motions before providing those motions to the clean team; spoke to defense counsel on behalf of the clean team; as well as various other tasks to ensure that the members of the clean team were not exposed to immunized testimony. The filter team also communicated with members of the "tainted team" to ensure that no evidence of immunized testimony was given to the clean team by the tainted team. All contact between the tainted team and the clean team was limited after May 16, 2016.

#### ARGUMENT

The State acknowledges that the Defendant is entitled to a *Kastigar* hearing. When the government proceeds to prosecute 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, 461-2 (1972). A trial court must normally hold a *Kastigar* hearing for the purpose of allowing the government to demonstrate that it obtained all of the evidence it proposes to use from sources independent of the compelled testimony. *See, e.g., United States v. Rinaldi*, 80 F. 2d 1579 (1987). A trial court may hold a *Kastigar* hearing pre-trial, post-trial, mid-trial (as evidence is offered) or it may employ some combination of these methods. *United States v. De Diego*, 167 U.S. App. D.C. 252 (1975). A pre-trial hearing is the most common choice. *United States v. North*, 910 F. 2d 843, 855 (1990). A court holding a *Kastigar* hearing "must make specific findings on the independent nature of this proposed, allegedly tainted evidence." *Rinaldi*, 80 F. 2d at 1584. The government must

satisfy its burden by a preponderance of the evidence. *United States v. North*, 910 F. 2d 843, 854 (D.C. Cir. 1990). The immunized testimony cannot be used to obtain investigatory leads, *United States v. Ponds*, 454 F.3d 313, 327-8 (D.C. Cir. 2006); obtain evidence by focusing an investigation on the witness, *id.*; or motivate another witness to give incriminating testimony. *United States v. Hylton*, 294 F. 3d 130, 134 (D.C. Cir. 2002). An immunized witness who is prosecuted, must be put in “substantially the same position as if [he] had claimed his privilege.” *United States v. Slough*, 641 F. 3d 544 (D.C. Cir. 2011).

While the State does not contest that a *Kastigar* hearing is appropriate, the only evidence that this Court would consider in a *Kasitgar* hearing would be the State’s investigatory steps and preparation *after* it elicited immunized testimony. Although the Defendant references dismissing the indictment and grand jury testimony in his motion, in the present case most of the investigation and all of the grand jury testimony was completed and the indictment returned before Officer Miller testified on May 16, 2016. The *Kastigar* hearing in this case would be limited to evidence acquired after immunized testimony and would have no bearing on the Indictment.

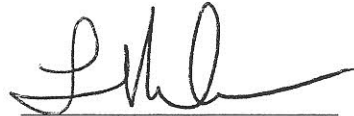
The Defendant cites no authority for his request that a prosecutor from an agency other than the Baltimore City State’s Attorney’s Office should represent the State in the *Kastigar* hearing. The State understands a defendant’s rights under *Kastigar* are protected, in part, by self-policing. See *In re Grand Jury Subpoenas*, 40 F. 3d 1096, 1103 (10th Cir. 1994) (self-policing involved prosecutors having potential *Garrity* material reviewed and redacted by persons who are not part of the prosecution team); *United States v. Mapelli*, 971 F. 2d 284, 288 (9th Cir. 1992) (noting government often protects against a claim of indirect use by assigning the case to others not exposed and restricting communication between them and the prosecutors who

obtained the compelled testimony). The State is not aware of any court requiring an outside agency to conduct a *Kastigar* hearing.

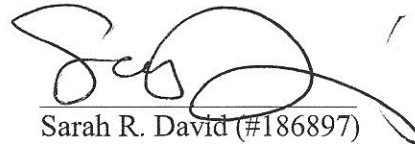
The Defendant also cites no basis for having “each prosecutor involved in the investigation, preparation and prosecution of Officer Miller’s case” testify in a *Kastigar* hearing. (Defendant’s *Motion for a Kastigar Hearing* at 6). Evidence challenged in a *Kastigar* hearing must be “concrete and not merely predictive.” *United States v. Kilroy*, 27 F.3d 679, 687 (D.C. Cir. 1994). The Fourth Circuit has agreed that the government does not need to negate all abstract possibilities of a taint. *Welsh v. Holt*, 78 F. 3d 580 (1996) (explaining that the occurrences Welsh identified amounted to speculative opportunities for taint to occur); *see also United States v. Byrd*, 765 F. 2d 1524, 1529 (11th Cir. 1985). The type of proof that the State will present to establish that no tainted material has or will be used will vary depending on the nature and the extent of any alleged *Kastigar* violations the Defendant raises. *See, e.g., United States v. North*, 920 F. 2d 940, 943 (D.C. Cir. 1990) (government may shoulder its burden “in any fashion” or through “use of any techniques”); *see also United States v. Daniels*, 281 F. 3d 168, 181 (5th Cir. 2002) (*Kastigar* evidence presented via FBI reports, grand jury transcripts, and case agent’s testimony); *United States v. Moytana*, 45 F. 3d 1296, 1299 (1995) (government bore *Kastigar* burden via declarations and documents; no requirement that hearsay witnesses be presented for cross-examination); *United States v. Rogers*, 722 F. 2d 557, 560 (9th Cir. 1983) (declarations used in *Kastigar* hearing). The State recommends a conference with Defendant, his counsel, and this Honorable Court to discuss the Defendant’s specific allegations against the State at this juncture and the preferred method for the State to present evidence in the *Kastigar* hearing.

Respectfully submitted,

Marilyn J. Mosby

A handwritten signature in black ink, appearing to be 'L Phelps', with a long horizontal flourish extending to the right.

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A handwritten signature in black ink, appearing to be 'S R David', with a large loop and a long horizontal flourish extending to the right.

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**CERTIFICATE OF SERVICE**


I hereby certify that on this 12th day of July, 2016, a copy of the Response to Defendant's Motion for a *Kastigar* Hearing was mailed and e-mailed to:

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Respectfully submitted,

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