

**IN THE DISTRICT COURT IN AND FOR TULSA COUNTY  
STATE OF OKLAHOMA**

**STATE OF OKLAHOMA,**

**Plaintiff,**

**v.**

**GORDON TODD SKINNER.**

**Defendant.**

**Case No. CF-2003-4213**

**GORDON TODD SKINNER'S SUPPLEMENTAL KASTIGAR MOTION AND  
MOTION TO DISMISS THE CHARGES CURRENTLY PENDING AGAINST HIM**

COMES NOW the Defendant, Gordon Todd Skinner, by and through his attorney, Kevin D. Adams, and pursuant to Kastigar v. United States, 406 U.S. 441, (1972), Santobello v. New York, 404 U.S. 257 (1971), United States v. McDaniel, 449 F.2d 832 (8<sup>th</sup> Cir. 1971), United States v. Avery, 621 F.2d 214 (5<sup>th</sup> Cir. 1980), the Fifth Amendment to the United States Constitution, The Fourteenth Amendment to the United States Constitution, Article 2 § 7, 21 and 27 of the Oklahoma Constitution and 18 U.S.C. § 6002 and moves this Court to dismiss the charges pending against the defendant **unless** the State of Oklahoma can affirmatively prove that the evidence it proposes to use against Mr. Skinner is derived from a legitimate source wholly independent of Mr. Skinner's compelled testimony and compelled disclosures. In support of this Motion, Defendant, Gordon Todd Skinner, alleges and states the following:

**STATEMENT OF FACTS**

In October of 2000, after asserting his Fifth Amendment privilege against self incrimination, the defendant, Gordon Todd Skinner, was given a grant of immunity by the Department of Justice. (See attached Exhibit A, Copy of Immunity Letter signed by John Roth, Chief of

Narcotic and Dangerous Drug Section, United States Department of Justice, herein after “Immunity Agreement”). The immunity agreement between Gordon Todd Skinner and the United States Department of Justice required Mr. Skinner to:

..meet with federal agents, to provide information, cooperation, testimony, such documents as you may control, and evidence concerning all facts within your knowledge concerning the subject matter involved.

(see attached exhibit A, immunity Agreement, (1) emphasis added)

In exchange for his cooperation the government agreed:

...that no statement or **other information** (including documents) given by you during this and subsequent meetings will be used directly or **indirectly** against you **in any criminal case**, as those terms are understood in **18 U.S.C. § 6002**.

(see attached exhibit A, immunity Agreement, (2) emphasis added)

In October of 2000 Mr. Skinner met with Nancy Carter, *Intelligence Officer for the Department of Justice*; Karl Nickels, *Forensic Chemist/Special Agent Drug Enforcement Agency*; Zach Zagjack, *Special Agent—Drug Enforcement Agency, Washington D.C.*; and Bob Dey, *Special Agent in Charge-Western United States Region*. During the course of Mr. Skinner’s cooperation with the government Mr. Skinner disclosed information to the government concerning and describing the worldwide LSD system, the worldwide MDMA (extacy), United States of America v. Ryan Overton; filed in Kansas City, United States of America v. Pickard, and United States of America v. Tanasis Kanculis, filed in the Northern District of Oklahoma.

Mr. Skinner continued to meet with DEA agents under his cooperation agreement with the government. Mr. Skinner began meeting with Agents Andy Langen, Eric Watson. Agents

Watson and Langen were assigned the Kansas City Drug Enforcement Office. All of Mr. Skinner's cooperation was covered under his immunity agreement attached as exhibit A, a letter from the Kansas City, Missouri United States Attorney's office that memorialized and endorsing the immunity agreement in exhibit A, and judicial immunity issued by United States District Judge Richard D. Rogers attached as Exhibit B.

In early 2001 as part of his obligations under the immunity agreement Mr. Skinner introduced the agents to Krystal Ann Cole. *(The letter issued by the Kansas City, Missouri United States Attorney's office is significant because it covered the Tanasis Kanculis case which Krystal Cole, Mr. Skinner's co-defendant was provided by Mr. Skinner as a source for the investigation.)* The government was not aware of Ms. Cole's identity as a witness in these matters prior to Mr. Skinner's introduction of her. After introducing Krystal Ann Cole to the government DEA agent Andy Langen approached Ms. Cole telling her that if she ever wanted to cooperate with the government against Mr. Skinner to contact the DEA. *(This of course would be a violation of Mr. Skinner's immunity as it would be derivative use of Mr. Skinner's immunized disclosures, see Arguments and Authorities section)* After Ms. Cole was propositioned by the Special Agent Langen to cooperate against Mr. Skinner, Ms. Cole relayed that conversation to Mr. Skinner and various other witnesses. (Emily Regan, Michael Hobbs, Gunner Gunnian and agent Karl Nichols)

Mr. Skinner continued to cooperate with the government and eventually testified on behalf of the government in case titled *United States of America vs. William Leonard Pickard, In the United States District Court for the District of Kansas, Case No. 00-40104-01/02-RDR.*

Before Mr. Skinner testified he once again asserted his Fifth Amendment privilege and was ordered to testify and once again was granted immunity. This time he was given immunity by United States District Judge Richard Rogers, pursuant to Title 18 U.S.C. § 6001 et. seq. (See attached Exhibit B, Judicial Immunity Order)

During Mr. Skinner's testimony in *USA v. Pickard*, Krystal Cole had direct access to Mr. Skinner's immunized testimony. During the course of the trial Agent Karl Nichols arranged for Ms. Cole to assist the court reporter in the court reporter's daily preparation of the transcripts. The government had requested this assistance because Ms. Cole understood the complex nature of Mr. Skinner's testimony and the unusual nomenclature used during the testimony.

In March of 2003 after Mr. Skinner began testifying Krystal Cole was introduced to Agent Roger Hanzlick for the first time in the Federal court Building in Topeka, Kansas. Agent Hanzlick met Ms. Cole after she was subpoenaed to testify in the *Pickard* case.

On approximately June 10<sup>th</sup> of 2003 Krystal Cole was dating Brandon Green, the alleged victim in the present case. Krystal Cole decided that she no longer wished to be associated with Mr. Skinner and called the Kansas City DEA office in an attempt to take the DEA up on their previous offer to cooperate against Gordon Todd Skinner. When Ms. Cole called the DEA office and she spoke with Special Agent Watson. She informed Watson that it was her desire to cooperate with the DEA against Mr. Skinner as first offered by Special Agent Langen some two years previously. Agent Watson told Ms. Cole that he could not use her as source of information against Mr. Skinner because it would be a violation of Mr. Skinner's immunity agreement. Mr.

Watson also told her that he would contact AUSA Greg Hough to inquire with Mr. Hough concerning the matter.

A couple of days after her initial contact with the Kansas City DEA office Ms. Cole was contacted by Agent Roger Hanzlick who arranged a meeting between Ms. Cole and agents DuWayne Barnett and Doug Kidwell of the DEA office in Tulsa, Oklahoma. At the meeting Ms. Cole provided information for the DEA agents against Mr. Skinner, including information that was the subject of Mr. Skinner's immunized disclosures and testimony. (See Attached Exhibit C, DEA Form 6, June 12, 2003 debriefing of Krystal Ann Cole) During this initial meeting Brandon Green, the alleged victim in this case, also met with Agents Kidwell and Barnett. (See Attached Exhibit D, DEA Form 6, June 12, 2003 debriefing of Brandon Green) Both Ms. Cole and Mr. Green provided information to the DEA concerning Mr. Skinner. (See Exhibits C and D)

After meeting with Ms. Cole and Mr. Green the DEA opened up a full-blown investigation of Mr. Skinner. (See attached Exhibit E, numerous DEA Form 6 reports detailing the investigation of Mr. Skinner.) ***(It should be noted that this entire investigation can be traced back to the immunized disclosure of Mr. Skinner concerning the identity of Ms. Cole and his introduction of her to government agents.)***

The illegal investigation of Mr. Skinner by the DEA began before the allegations in this particular case and continued through at least August of 2003. During this investigation Assistant United States Attorney, Allen Litchfield, assigned to the Northern District of Oklahoma became involved in the investigation of Mr. Skinner. (See attached Exhibit F, DEA Form 6 reports Debrief of Betty Stetler July 8, 2003) ***(It should be noted that Exhibits D, E and F provide the***

*source of the “prior bad acts evidence” that the state of Oklahoma has sought to introduce against Mr. Skinner in the matter.)*

During the investigation of Mr. Skinner AUSA Allen Litchfield contacted AUSA Greg Hough. Mr. Hough was the Assistant United States Attorney in Kansas that prosecuted the *USA v. Pickard* case in which Mr. Skinner gave immunized testimony. Mr. Litchfield is asked Mr. Hough about Mr. Skinner. The reason for the inquiry is that on July 8<sup>th</sup> 2003 Mr. Skinner and Mr. Skinner’s attorney H.I. Aston went to the Tulsa Field Office of the DEA to inquire about why the DEA Agents were conducting an illegal investigation against Mr. Skinner. (This meeting was tape recorded by the DEA Agents and Mr. Skinner and his lawyer Mr. H.I. Aston were thoroughly searched before the meeting.)

Mr. Litchfield was informed of this meeting and on July 9, 2003 at 4:40 P.M. Mr. Litchfield sent Mr. Hough the following email;

*Subject: Re: Skinner*

*Can you tell me what this guy was up to? He popped up and walked into the DEA claming all types of immunity etc. Frankly he sounds a little spooky.*

*AJL*

(See attached Exhibit G, email correspondence of AUSA Allen Litchfield)

*(Mr. Litchfield is unsure how to handle Mr. Skinner and is inquiring of an AUSA who knows Mr. Skinner well, due to his immunized disclosures, to assist him in formulating a strategy and focus the investigation on Mr. Skinner. This is derivative use of Mr. Skinner’s immunized*

*testimony and disclosures and violates Mr. Skinner's immunity agreement, United States District Judge's Immunity Order, 18 U.S.C. §6002, Kastigar and its progeny.)*

The next morning on July 10, 2003 at 8:24 am AUSA Greg Hough responds to Mr. Litchfield's inquiry. In the email Mr. Hough informs Mr. Litchfield that Mr. Skinner testified under immunity in the federal trial in Kansas.

*....Skinner was involved in an LSD deal. He & his attorney got DOJ to give him immunity for his testimony against the 2 other leaders (Pickard & Apperson)*

(See attached Exhibit G, email correspondence of AUSA Allen Litchfield)

*(To assert a claim under 18 U.S.C. § 6002 all the defense is required to do is make a prima facie showing that Mr. Skinner gave immunized disclosures. Exhibit A the immunity agreement, exhibit B Judge Roger's Immunity Order and this email Exhibit G makes that prima facie case.. After making this initial showing the burden shifts to the State to affirmatively prove that all the evidence the intend to introduce against Mr. Skinner is wholly independent of the immunized disclosures.)*

Mr. Hough goes on to explain how Mr. Skinner made a complaint against him and the DEA agents during the *Pickard* trial. During the course of the trial an issue arose concerning whether AUSA Hough and DEA Agents, including Agent Hanzlick, were improperly receiving inside information concerning documents and exhibits that the defense was requesting from the Court. Once this allegation came to light Mr. Skinner provided a affidavit on the subject. AUSA Hough, DEA Agent Nichols and DEA Agent Hanzlick also provided affidavits regarding the

subject. (See Attached Exhibit H, Affidavits from Skinner, Hough, Nichols and Hanzlick) In the July 10, 2003 email AUSA Hough discusses this issue.

*After his testimony in his LSD trial in D. Kan., Skinner flipped back into the arms of his co-conspirators. This precipitated a bunch of mini-trials during the trial wherein Skinner, sponsored by Pickard & Apperson, testified that the 3 DEA agents, a courtroom deputy and I all conspired to effect his trial testimony. Skinner alleged that despite our best efforts, he testified truthfully. However, it was a tremendous distraction, likely caused OPR investigations of all concerned and, at very least, was a breach of his immunity agreement.*

(See attached Exhibit G, Email correspondence of AUSA Allen Litchfield, July 10, 2003 email of AUSA Greg Hough)

Mr. Hough goes on to offer his opinion that Mr. Skinner breached his immunity agreement and misstates the fact that his immunity was limited to the LSD trial. However, it should be noted that that is Mr. Hough's opinion is not the opinion of the Department of Justice. AUSA Hough does not have the authority to issue or rescind immunity. (See 18 U.S.C. § 6001) The Department of Justice has never attempted to revoke Mr. Skinner's immunity and certainly has never attempted to prosecute Mr. Skinner for the disclosures made in his testimony. AUSA Hough goes on to talk about how he dislikes Mr. Skinner because of Skinner's complaint and how he and the DEA agents would like to see Mr. Skinner sent to prison.

*...and I know 3 DEA agents, a courtroom deputy and an AUSA that would love to see him imprisoned and the key thrown away.*



(See attached Exhibit G, email correspondence of AUSA Allen Litchfield, July 10, 2003 email of AUSA Greg Hough)

AUSA Hough goes on to suggest to AUSA Litchfield that he should coordinate his efforts with Agent Karl Nichols who also participated in the Federal Trial and knows Mr. Skinner.

*The lead DEA Agents were Karl Nichols, Oakland, CA. and Roger Hanzlik, Kansas City. Either, or both, can shed additional light on the matter. If you've got agents talking to Skinner, they should definitely coordinate with Nichols and Hanzlik.*

*Gregory G. Hough  
O.C.D.E.T.F. Lead AUSA  
District of Kansas*

(See attached Exhibit G, email correspondence of AUSA Allen Litchfield, July 10, 2003 email of AUSA Greg Hough)

*(To coordinate with Agents Nichols and Hanzlik would be derivative use of Mr. Skinner's immunized testimony and disclosures and violates Mr. Skinner's immunity agreement, Judge Rogers Immunity Order—Exhibit B, 18 U.S.C. §6002, Kastigar and its progeny.)*

AUSA Hough sends a carbon copy of this email to Agent Karl Nichols. Also in the email to AUSA Litchfield there is discussion of a memo written by Agent Nichols about Mr. Skinner. Then AUSA Litchfield emails AUSA Hough and requests a copy of the memo written by Agent Nichols on Mr. Skinner.

*Skinner is up to his old tricks again in his home town. We are looking at him as a target. He is trying to head us off. I'm certain that nobody will try and use him as a CI. Is it possible to get a copy of the memo? Thanks.*

AJL

(See attached Exhibit G, email correspondence of AUSA Allen Litchfield, July 10, 2003 email of AUSA Litchfield)

AUSA Hough responds to AUSA Litchfield's request by providing Karl Nichols phone number. Agent Nichols begins emailing AUSA Litchfield and in his emails he discloses that he has already been coordinating with DEA Agent Kidwell who is in the Tulsa DEA office and who interviewed both Brandon Green and Ms. Cole. (See attached Exhibit G, email correspondence of AUSA Allen Litchfield, July 16, 2003 email of Agent Nichols) *(Not only is Agent Nichols now coordinating his investigation with AUSA Litchfield he also admits that he has already strategized/coordinated his efforts with DEA Agent Doug Kidwell. The problem is that because DEA Agent Nichols possesses knowledge of Mr. Skinner comes directly from Mr. Skinner's immunized disclosures Agent Nichols participation in strategy and focusing of the investigation on Mr. Skinner is derivative use of Mr. Skinner's immunized disclosures.)*

During the days surrounding the 4<sup>th</sup> of July of 2003 both Brandon Green the alleged victim in this case and Ms. Cole the co-defendant in this case are still actively working to provide the DEA with information concerning Mr. Skinner. In fact Mr. Green's presence in the proximate of Mr. Skinner is nothing more than an effort by Mr. Green to gain information about Mr. Skinner in order to assist the DEA in their investigation. The alleged victim in this matter was arrested in Lebanon, MO for drugs and made disclosures to the authorities concerning Mr.

Skinner in an effort to stay out of jail. (See attached Exhibit E, numerous DEA Form 6 reports detailing the investigation of Mr. Skinner. Report dated 7/11/03 Bates page 338)

After the events surrounding the 4<sup>th</sup> of July weekend the DEA and the FBI began to investigate the *Assault and Kidnapping of Brandon GREEN on or about July 4, 2003*. (See attached Exhibit I DEA Form 6 titled *Assault and Kidnapping of Brandon GREEN on or about July 4, 2003* prepared July 15, 2003, bates page 360)

The July 15, 2003 DEA report details how the agents spoke with Mark Green the father of Brandon Green. Mark Green provided the DEA agents with information that is virtually identical to the information turned over to defense in discovery. Mr. Green also provided copies of his son's medical records. The defense has also received copies of Brandon Green's medical records in discovery of the present case.

The DEA begin to investigate the allegations that provide the basis for the present state charges. On July 16, 2003 the DEA agents interview William Hauck, Mr. Skinner's co-defendant and present witness for the state. (See attached Exhibit J, DEA Form 6 report detailing interview with William Hauck, Beginning at Bates page 362)

On July 18, 2003 the DEA and the FBI interview Brandon Green regarding his allegations. (See attached Exhibit K, DEA Form 6 report detailing interview with Brandon Green, Beginning at Bates page 372)

On July 11, 2003 DEA agents interview Kristi Roberts concerning Mr. Skinner and on July 14, 2003 the DEA re-interviewed Kristi Roberts concerning the allegations that Mr. Skinner is presently accused of. Kristi Roberts is an endorsed witness for the state in this matter. (See

attached Exhibit L, DEA Form 6 report detailing interview with Kristi Roberts, Beginning at Bates page 353)

However, despite all of the investigation by the federal authorities Mr. Skinner was never charged by the federal government. At some point at the beginning of August of 2003 the Federal investigation of this matter ceased and the Tulsa Police Department picks up the investigation. The Tulsa Police re-interview all of the witnesses that the DEA have already interviewed. The investigation follows the exact same track that the federal investigation took.

During the Tulsa Police investigation there is collaboration between the Tulsa Police Department and the DEA. In video taped interview of the state's endorsed witness, Kristi Roberts, Detective Gene Watkins ask Kristi Roberts a question that he says that the DEA wanted him to ask her about. Furthermore, it is the belief of the defense that copies of the interviews, DEA 6 forms, photographs, medical records, police reports from other jurisdictions and other leads were all turned over to the Tulsa Police directly from the DEA and the FBI.

In short the state's entire case was first developed by the DEA while conducting an illegal investigation against Mr. Skinner. The investigation is illegal because it can be traced back to derivative use of Mr. Skinner's immunized statements; specifically, his disclosures about Ms. Cole and his introduction of Ms. Cole to the DEA agents. Furthermore, DEA Agents and an Assistant United States Attorney that were privy to the immunized statements of Mr. Skinner improperly used those statements against him to gain leads, strategize and focus their investigation that targeted Mr. Skinner.

## ARGUMENTS AND AUTHORITIES

### I. THE STATE OF OKLAHOMA **MUST** SHOW A WHOLLY INDEPENDENT SOURCE FOR THE EVIDENCE IT INTENDS TO INTRODUCE AGAINST MR. SKINNER AT TRIAL

When prosecuting a witness that has previously given immunized disclosures the government bears the burden of proving a “wholly” independent source for the evidence it intends to introduce at trial. In Kastigar, the Supreme Court held that the Government's burden of proof *"is not limited to the negation of taint, rather it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled."* Kastigar v. United States, 406 U.S. 441, 460 (1972).

Thus, once the defendant makes a prima facie showing that he gave immunized testimony, the Government must go forward to show no use of that testimony and its independent evidence. Kastigar v. United States, 406 U.S. 441, 460 (1972)

One raising a claim under this statute need only show the he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate and independent sources.

Kastigar v. United States, 406 U.S. 441, 462 (1972)

As stated by the United States Supreme Court in the Kastigar opinion:

A person accorded this immunity under 18 U.S.C. 6002, and subsequently prosecuted, is not dependant for the preservation of his rights upon the integrity and good faith of the prosecuting authorities.

Kastigar v. United States, 406 U.S. 441, 461 (1972)

Just as cited in the Kastigar case Mr. Skinner was granted immunity under 18 U.S.C. § 6002.

II. OKLAHOMA STATE COURTS HAVE ALSO ADOPTED AND RELIED UPON THE SUPREME COURTS RULING IN THE *KASTIGAR* CASE.

In *Gilchrist V. Board Of Review Of The Okla. Employment Security Commission*, 2004 OK 47, 94 P.3d 72 (Okla. 2004) the Oklahoma Supreme Court cited to the *Kastigar* case in footnote 13. In *State v. Humdy*, 1994 OK CR 35, 875 P.2d 429 (1994) in a case involving a competency trial of a defendant the Oklahoma Court of Criminal Appeals cited to the *Kastigar* case in stating that “*Under the Kastigar analysis, 22 O.S. 1981 § 1175.4 [22-1175.4](D), is constitutional as it bars the use of the accused's statement for any purpose*”. And in *Clem v. State*, 1985 OK CR 66, 701 P.2d 770, 773 (Ok. Cr. 1985) the Oklahoma Court of Criminal Appeals cites to the *Kastigar* case in describing how a grant of immunity from one sovereign is binding upon another sovereign.

III. THE *KASTIGAR* CASE WAS ALSO CITED AS A BASIS FOR DISMISSING A FEDERAL INDICTMENT AGAINST A WELL KNOW DEFENDANT IN THE NORTHERN DISTRICT OF OKLAHOMA.

On February 6, 2004 United States District Judge Sven Eric Holmes filed an order dismissing the federal indictment against Gertrude Brady co-defendant of Bill Bartman former CEO of Commercial Financial Services. (See attached Exhibit M, Order from USA v. Gertrude Ann Brady, 02-CR-163 H)

Beginning on page 13 Judge Holmes begins his conclusions of law offering many helpful citations of law relevant to issues in both Ms. Brady’s case and Mr. Skinner’s case. On page 16

of the Brady Order Judge Holmes addresses the *Kastigar* issue as it pertained to Ms. Brady's case.

Moreover, even if the position of the United States were taken in its best light, Ms. Brady was given "use immunity" for her testimony, implicating the concerns set forth in *Kastigar*. There, the Supreme Court held when immunity has been given the prosecution must prove their evidence comes from a wholly independent source, and cannot be tainted by what the person with use immunity revealed. Moreover, the Supreme Court noted the Fifth Amendment privilege (overridden by use immunity) protects against disclosures the person reasonably believes could lead to other evidence against that person. *Kastigar*, 406 U.S. at 445.

(See attached Exhibit M, Order from USA v. Gertrude Ann Brady, 02-CR-163 H)<sup>1</sup>

#### IV. IMMUNITY GRANTED BY ONE SOVERIGN IS BINDING UPON ANOTHER SOVERIEGN

In *Clem v. State*, 1985 OK CR 66, 701 P.2d 770, 773 (Ok. Cr. 1985) the Oklahoma Court of Criminal Appeals cites to the *Kastigar* case and the *Murphy* in stating that a grant of immunity from one sovereign is binding upon another sovereign.

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<sup>1</sup> The timing of the dropping of the Federal investigation in this matter and the events surrounding Brady case appear to intersect. The United States Attorney's office filed a superseding indictment charging Gertrude Brady on July 17, 2003. On August 8, 2003 Thomas Seymour and Robert Burton filed "Gertrude Brady's Motion and Brief to Dismiss the Indictment Based on the United State's Agreement not to prosecute Her for Any Offenses Concerning Her Affiliation With Commercial Financial Services, Inc." Not only was Ms. Brady's case dismissed but her attorneys Thomas Seymour and Robert Burton recovered \$221,568 worth of attorney fees from the Federal Government for the vexatious and bad faith prosecution of Ms. Brady. (See Attached Exhibit L, August 3, 2004 Tulsa World Article) The federal investigation of Mr. Skinner ceased around this time as well.

The United States Supreme Court has held that a grant of immunity by a State court prohibits federal authorities from using that testimony, or any evidence obtained therefrom, in a subsequent prosecution against the witness. *Murphy v. Waterfront Commission of New York Harbor*, [378 U.S. 52](#), 79, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964).

*Clem v. State*, 1985 OK CR 66, 701 P.2d 770, 773 (Ok. Cr. 1985)

V. USE IMMUNITY PROHIBITS BOTH DIRECT AND DERIVATIVE USE OF IMMUNIZED COMPELLED DISCLOSURES.

Mr. Skinner was provided with immunity pursuant to 18 U.S.C. 6002 by both his immunity agreement (See attached exhibit A) and by a grant of Judicial Immunity from United States District Judge Richard Rogers, as a result of his testimony in *United States of America vs. William Leonard Pickard, In the United States District Court for the District of Kansas, Case No. 00-40104-01/02-RDR*. (See Exhibit B)

18 U.S.C. § 6002 provides:

**Section 6002. Immunity generally**

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to –

- (1) a court or grand jury of the United States,
  - (2) an agency of the United States, or
  - (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
- and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; **but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be**



**used against the witness in any criminal case**, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Immunized testimony and compelled disclosures cannot even be used to provide an **investigative lead** or to **focus an investigation on a witness**.

This total prohibition on use provides a comprehensive safeguard barring the use of compelled testimony as an 'investigatory lead,' and . . . the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

Kastigar v. United States, 406 U.S. 441, 460 (1972)

It is clear from the evidence that Agent Nichols, Agent Hanzlick, and AUSA Hough were using Mr. Skinner's immunized statements as investigatory leads and to focus the investigation on Mr. Skinner

In *Gilchrist V. Board Of Review Of The Okla. Employment Security Commission*, 2004 OK 47, 94 P.3d 72, footnote 13 (Okla. 2004) the Oklahoma Supreme Court described use immunity as:

**Use immunity** prohibits the use of compelled testimony or any evidence derived from that testimony against the witness in a criminal prosecution.

*Gilchrist V. Board Of Review Of The Okla. Employment Security Commission*, 2004 OK 47, 94 P.3d 72, footnote 13 (Okla. 2004)

The most exhaustive judicial consideration of the derivative evidence problem before the Court is found in United States v. North, 910 F.2d 843, on rehearing, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991). Although the Tenth Circuit has not yet been faced with this precise issue, it has cited the North opinion with approval. See In re Grand Jury Subpoenas, 40 F.3d 1096, 1101 n.4 (1994), cert. denied, 514 U.S. 1107 (1995).

Lt. Col. Oliver North was compelled to make statements in a congressional hearing, as a result of a grant of testimonial immunity. In Col. North's subsequent criminal trial, the Government did not offer any of the compelled statements into evidence, but was allowed to call numerous witnesses who had been exposed to the those compelled statements. The appellate court vacated the defendant's convictions, concluding that the use of the compelled statements "by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements" violated the Fifth Amendment. North, 910 F.2d at 856. *(It should be noted that Ms. Cole was not only introduced to the DEA by Mr. Skinner but she was also exposed to Mr. Skinner's immunized testimony.)*

The North court concluded that the prosecution was required to show "for each grand jury and trial witness" that "no use whatsoever was made of any of the immunized testimony either by the witness or by the [prosecutor] in questioning the witness." The Government's burden in this regard has been described by the Supreme Court (as well as by the North court), as a "heavy burden." See Kastigar v. United States, 406 U.S. 441, 461 (1972); North, 910 F.2d at 854.<sup>2</sup>

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<sup>2</sup>See also United States v. Beery, 678 F.2d 856, 863 (10th Cir. 1982)

The required hearing was described by the North court as one which “**must proceed witness-by witness; if necessary, it will proceed line-by-line and item-by-item.**” 910 F.2d at 872. (emphasis added) The nature of this hearing was further described as follows:

... the prosecutor has to prove that witnesses who testified against the defendant did not draw upon to the immunized testimony to use it against the defendant; the burden of disproving use cannot ... be shifted onto the defendant, nor can the defendant be required to assume the burden of going forward with evidence that puts into issue the question of use. Most important, the defendant is entitled to a hearing at which he would be able to challenge the prosecution’s case for non-use.

United States v. North, 920 F.2d 940, 943 (D.C. Cir. 1990).

Although the North court discussed the problem of nonevidentiary use in considerable detail, it ultimately sidestepped the issue. See North, 910 F.2d at 859-60. The leading case to actually decide the nonevidentiary use issue which the North court avoided is United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973), a case discussed at length in the North opinion.

Although the defense has found no Tenth Circuit decision on the issue of nonevidentiary use, the Tenth Circuit has cited McDaniel with approval. See United States v. Beery, 678 F.2d 856, 860 (10th Cir. 1982) and United States v. Fountain, 776 F.2d 878, footnote #106 (10<sup>th</sup> Cir. 1985). Judge Holmes also cited the McDaniel case in his Order dismissing the indictment against Gertrude Brady. (See attached exhibit M, Order from USA v. Gertrude Ann Brady, 02-CR-163 H)

McDaniel involved a federal prosecutor who reviewed a transcript of a defendant’s compelled testimony (procured through an immunity grant) in another case. Although neither the testimony nor evidence derived from it were offered in the defendant’s federal criminal trial, the appellate court nonetheless concluded that the prosecution’s nonevidentiary use of that

testimony required dismissal of the indictment. According to the McDaniel court, the Fifth Amendment is violated by nonevidentiary prosecutorial uses of a defendant's coerced testimony. Such uses "could conceivably include **assistance in focusing the investigation, deciding to initiate prosecution**, refusing to plea-bargain, **interpreting evidence**, planning cross-examination, and otherwise **generally planning trial strategy**." 482 F.2d at 311. (Emphasis added)

## VI. THE ENFORCEMENT OF IMMUNITY AGREEMENTS FURTHER'S THE FAIR AND PROPER ADMINISTRATION OF JUSTICE.

As stated on page 13 of Judge Holmes Order dismissing Gertrude Brady's Federal Indictment;

Cooperation agreements, "like plea agreements, function as an 'essential part' of the criminal justice process and are 'highly desirable' as means to assist law enforcement investigative efforts." United States v. Pinter, 971 F.2d 554, 557 (10<sup>th</sup> Cir. 1992)

"...[P]romises in cooperation agreements, 'whether directly or indirectly made, must be fulfilled to their fullest extent in furtherance of fair and proper administration of justice. United States v. Avery, 621 F.2d 214, 215 (5<sup>th</sup> Cir. 1980). Moreover, construction of such agreements 'requires determining what the defendant reasonably understood' when the agreement was executed. See United States v. Shorteeth, 887 F.2d 253, 256 (10<sup>th</sup> Cir. 1989); United States v. Greenwood, 812 F.2d 632, 635 (10<sup>th</sup> Cir. 1987); Pinter, 971 F.2d at 557 (10<sup>th</sup> Cir. 1992).

On page 14, Judge Holmes went on to discuss why it is important for such agreements to be fully enforced:

Compelling a suspect to give testimony is not only the only source of a prosecutorial obligation to refrain from using information; such an obligation also may arise as part of an agreement under which the suspect provides information in exchange for a promise from the prosecutor not to use it against him (use immunity) or, not to prosecute at all (transactional immunity)..Agreements of this nature are enforced not only because of the self-incrimination clause requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects giving evidence that the government needs against others which simultaneously implicates themselves.

United States v. Eliason, 3 F.3d 1149, 1152-1153 (7<sup>th</sup> Cir. 1993)

## **CONCLUSION**

It is clear from the evidence that Agent Nichols, Agent Hanzlick, and AUSA Hough used Mr. Skinner's immunized statements as investigatory leads and to focus their investigation on Mr. Skinner. Mr. Skinner's immunized disclosures were used to plan the investigation strategy, gain leads, to focus the investigation, and to interpret potential evidence. Then once the federal authorities realized that they had a problem they turned the evidence they had accumulated over to the Tulsa Police Department and then continued to coordinate with the Tulsa Police Department during the continued investigation of this matter.

Therefore, Mr. Skinner and his Counsel moves this Court to dismiss the charges pending against the defendant unless the State of Oklahoma can affirmatively prove that the evidence it proposes to use is derived from a legitimate source wholly independent of Mr. Skinner's compelled testimony and compelled disclosures. The defense also requests that the Court turn

over to the defense the remaining discovery given to the Court by the State of Oklahoma. It is the position of the defense that it would be improper for the Court and the State of Oklahoma to have evidence in this matter that the defense does not have access to.

Respectfully Submitted,

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**CERTIFICATE OF HAND DELIVERY**

I hear by certify that a copy of the foregoing instrument was hand delivered on April 1, 2005 to the office of the following:

Dave Robertson  
Tulsa County District Attorney's Office  
500 S. Denver  
Tulsa, OK 74103

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Kevin D. Adams