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

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CF-2003-4213**
	)	
	)	
GORDON TODD SKINNER.	)	
	)	
Defendant.	)	

GORDON TODD SKINNER'S SECOND 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), United States v. Kurzer, 534 F.2d 511 (2nd Circuit 1976)United States v. McDaniel, 449 F.2d 832 (8th Cir. 1971), United States v. Brimberry, 744 F.2d 580, para 35 (7th Circuit 1984) United States v. Webster Hubbell*, 530 U.S. 27, (2000),* United States v. Oliver North, 910 F.2d 843 (DC Circuit 1990), Elkins v. United States*, 364 U.S. 206, para 39 (1960)*, 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 or in the alternative exclude all evidence and information the State of Oklahoma cannot affirmatively prove is derived from a legitimate source wholly independent of Mr. Skinner's compelled disclosures. In support of this Motion, Defendant, Gordon Todd Skinner, alleges and states the following:

PURPOSE OF THIS MOTION

This motion has been written in order to further address the issue of derivative use of information obtained from Mr. Skinner's immunized statements and testimony pursuant to the immunity granted to him pursuant to the October 12, 2000 immunity agreement and the Judicial Immunity Order entered by United States District Judge Richard D. Rogers. (Both items are attached as Exhibits A and B, respectively)

The Scope of Derivative Use Immunity under the Fifth Amendment

Mr. Skinner was provided with immunity pursuant to 18 U.S.C. section 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)* The plain language of § 6002 is clear that no **testimony** or **other information** that is obtained through a grant of immunity or **any information obtained directly or indirectly derived from such testimony or other information** may be used against the witness in any criminal case.

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.

Not only does the statute preclude the use of testimony it also precludes the use of **information** that was obtained under a grant of immunity. The statute precludes the use of that **information** both directly and indirectly. The question that is important for this Court to answer is, whether the "sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom"[1] bars the use of information obtained as the result of an investigation that was focused on Mr. Skinner as a result of his immunized information and testimony?

The United States Supreme Court has already answered this question in the leading case on the issue. Immunized testimony and compelled disclosures cannot be used to provide an **investigative lead** or to **focus an investigation upon a witness.** In Kastigar the Court described this as a total prohibition on use of immunized information and **evidence** obtained by focusing investigation on a witness as a result of his compelled disclosures.

> This total prohibition on use provides a comprehensive safeguard barring the use of compelled testimony as an '**investigatory lead**,' and . . . the use of any

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

> 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 important to note what is stated above, that § 6002 precludes the use of any evidence obtained by focusing an investigation on a witness as a result of his compelled disclosures. Plainly stated if the government focuses an investigation upon a witness as a result of that witness's compelled disclosures, the government cannot use any information obtained during that investigation. This "total prohibition" on use is designed to put both the government and the witness back in the same position that they would have been, had the witnessed claimed the Fifth Amendment privilege. The Supreme Court's conclusion that § 6002 left the defendant in substantially the same position had he claimed the Fifth Amendment was the very justification that the Supreme Court used in finding that a defendant could be ordered to testify, after being granted immunity under the statute.

> We conclude that the immunity provided by 18 U.S.C 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it.
>
> Kastigar v. United States, 406 U.S. 441, 462 (1972)

The Eighth Circuit ruled that the use of such information to plan trial strategy, refusing to plea bargain, planning cross-examination, deciding to initiate prosecution and of course assistance in focusing the investigation was prohibited by the statute and the Fifth Amendment that it supplants.

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." United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).

It is improper for the government to use individuals identified in a witness's immunized statements to gather information against that witness. Information and testimony obtained pursuant to 18 U.S.C. § 6002 cannot be used to obtain the name of a co-conspirator and use the co-conspirator as a basis for indictment. See United States v. Kurzer, 534 F.2d 511 (2nd Circuit 1976).

The Supreme Court has already ruled that the use of a defendants compelled disclosures to obtain names of witnesses to be used against that defendant would be a violation of § 6002. Kastigar v. United States, 406 U.S. 441, 459 (1972).

In the United States v. Webster Hubbell*, 530 U.S. 27, (2000)* the United States Supreme Court emphasized the importance of § 6002's protection against future prosecutions. The Court also made it clear that the government could not use "knowledge" and "sources of information" obtained under § 6002.

> We stressed the importance of § 6002's "explicit proscription" of the use in any criminal case of 'testimony or other information compelled under the order (**or any information directly or indirectly derived from such testimony or other information**). We particularly emphasized the critical importance of protection against future prosecution based on knowledge and sources of information obtained from compelled testimony.

United States v. Webster Hubbell, *530 U.S. 27,para 49 (2000)*

Clearly a "source of information" is a witness that provides evidence or other information against a defendant. It is improper to identify a witness through immunized statements and testimony and then use that witness against the individual that provide the immunized information.

> One forbidden use of immunized testimony is the identification of a witness, but other uses of a citizen's immunized testimony—as presenting the testimony of a grand jury or trial witness that has been influenced by the immunized testimony—are equally forbidden.
>
> United States v. Oliver North, 910 F.2d 843, para. 104 (DC Circuit 1990)

In United States v. Kurzer the Second Circuit Court of Appeals remanded a case to the District Court to consider whether or not a defendant's testimony under 18 U.S.C. §6002 was part of a witnesses "motivation" to testify against the defendant. If the Court determined that the witness was motivated by the defendant's § 6002 testimony that witness would not be allowed to testify against the defendant because his testimony would be not be "wholly independent." United States v. Kurzer, 534 F.2d 511, paragraph 42 (2nd Circuit 1976).

In United States v. Brimberry, 744 F.2d 580 (7th Circuit 1984) the 7th Circuit Court of Appeals also remanded a case back to District Court in order for the Court to make a determination of whether witnesses against a defendant where motivated by the fact that a defendant provided immunized information against them.

> Accordingly, we remand this case with instructions to the trial court to hold a hearing at which the government must prove that Miller and Maeras would have testified against the defendant because the case the government had developed against them entirely apart from the defendant's information.
>
> United States v. Brimberry, 744 F.2d 580, para 35 (7th Circuit 1984)

THE EXCLUSIONARY RULE UNDER THE *FIFTH* AMENDMENT, KASTIGAR AND SECTION 6002, IS BROADER THAN THE EXCLUSIONARY RULE UNDER THE 4TH AMENDEMNT

Exclusion under Section 6002 and Kastigar, the *Fifth* Amendment, is broader than exclusion under the *Fourth* Amendment. The reason is that under the *Fourth* Amendment the primary purpose is to deter

unlawful police conduct. However, in a situation where the defendant has a Kastigar claim under the *Fifth* Amendment the purpose of the exclusion is not only to deter prosecution and police misconduct but to place both the government and the defendant in substantially the same position as if he had asserted his *Fifth* Amendment rights. Furthermore, under the Exclusionary Rule under the *Fourth* Amendment is used only to exclude evidence. However, under the *Fifth* Amendment it is used not only to exclude evidence but also to exclude information.

> However, the two situations are distinguishable, as commentators have emphasized. The reason is that the principle function of the Fourth Amendment exclusionary rule is to deter unlawful police conduct……The Fifth Amendment, in contrast, is by its terms an exclusionary rule, and **as implemented in the immunity statute is a very broad one**, prohibiting the use of not only evidence, but of "**information**", "**directly or indirectly derived**" from the immunized testimony. The statute requires not only that evidence be excluded when such exclusion would deter wrongful police or prosecution conduct, but that the witness be left in substantially same position as if he had claimed the Fifth Amendment privilege.
>
> United States v. Kurzer, 534 F.2d 511, paragraph 39 (2nd Circuit 1976) (Internal Citations Omitted)

EVIDENCE ILLEGALLY OBTAINED BY ONE GOVERNMENT ENTITY CANNOT BE MADE ADMISSIBLE SIMPLY BY TURNING THAT EVIDENCE OVER TO ANOTHER GOVERNMENT ENTITY.

This was the finding of the Untied States Supreme Court in the *Elkins* case when the Court rejected the Silver Platter doctrine that had previously allowed government officials with evidence illegally obtained by one government entity take the evidence to another government entity for prosecution.

> A conviction resting on evidence secured through such a flagrant disregard of the procedure of which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold.

For these reasons we hold that evidence obtained by state offices during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial.

Elkins v. United States*, 364 U.S. 206, para 39 (1960)*

THE GOVERNMENT HAS THE BURDEN OF PROVING THAT THE EVIDENCE IT DESIRES TO INTRODUCE IS DERIVED FROM A LEGITIMATE SOURCE WHOLLY INDEPENDENT OF THE COMPELLED DISCLOSURES

In the Kastigar case the Supreme Court explained why the burden was on the prosecution and not the defendant. In Kastigar the petitioners argued that the derivative use immunity would not be adequately protect a witness and therefore the witness should still be allowed to assert his or her *Fifth Amendment Privilege*;

> Petitioners argue that use and derivative-use will not adequately protect a witness from various possible incriminating uses of compelled testimony: for example, the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution. It will be difficult and perhaps impossible, the argument goes, to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting immunity.
>
> Kastigar v. United States, 406 U.S. 441, 459 (1972)

In rejecting this argument the Supreme Court highlighted the statute's prohibition.

> This argument presupposes that the statute's prohibition will prove impossible to enforce. The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom:
>
> "[N]o 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…"
> 18 U.S.C. 6002

> 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 Court's decision that protection of § 6002 is "sweeping" and that it is intended to preclude the use of any investigatory lead, names of witnesses or other information or any information derived directly or indirectly can be used against that witness in **any** criminal case. It is also apparent from the Court's ruling that Kastigar and 6002 was intended to prevent "the subtle ways in which the compelled testimony may disadvantage a witness". Kastigar v. United States, 406 U.S. 441, 459 (1972)

The Court then turned to the burden under 18 U.S.C. § 6002.

> A person accorded this immunity under 18 U.S.C. 6002, and subsequently prosecuted, is **not dependent for the preservations of his rights upon the integrity and good faith of the prosecuting authorities**.
>
> Kastigar v. United States, 406 U.S. 441, 460 (1972)

The Court then explains what the state's burden is in such a case;

> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather it imposes on the prosecution the affirmative duty to prove the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.
>
> Kastigar v. United States, 406 U.S. 441, 460 (1972).

A DIRECT Connection Between Skinner's Immunized Statements And The DEA Investigation

There is a direct link between Mr. Skinner's immunized statements and the investigation conducted by Corporal Watkins. In the July 10, 2003 email between AUSA Litchfield and AUSA Hough, Mr. Hough tells Mr. Litchfield;

> The lead DEA agents were Karl Nichols, Oakland California. 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 C Bates page 385 Email between AUSA Litchfield and AUSA Hough.)

In a July 16, 2003 email Karl Nichols, one of the lead agents on the *Pickard* case emails Allen Litchfield and says;

> I spoke with Doug Kidwell, before Skinner came in, to give him the details of the guy. I'll bet you had a very interesting interview.
>
> Karl

(See attached Exhibit C Bates page 385 Email between AUSA Litchfield and AUSA Hough.)

During the Kastigar hearing Corporal Watkins testified that he Spoke with DEA Agent Kidwell, DEA Agent Weaver's partner, and does not know who he talked with first. Tr. Page 51 Line 23 and TR. Page 52 Line 2. Corporal Watkins also testified that he met with the DEA Agents at the Federal Court house. Tr. Page 54 Line 19-21 and he was unsure whether he had been to their office on this case. Tr. Page 54 Line 23-25. However, Corporal Watkins did meet with Agent Kidwell at the Tulsa Police station and believes that is when he got the DEA notes. Tr. Pg. 55 Line 3. (However,

Corporal Watkins cannot tell us which Agent gave him the DEA notes, he cannot remember. “I can’t tell you positively which one gave me the notes or how I came upon them”. Tr. Page 55 Line 18-20).

Agent Nichols was the lead agent on the *Pickard* case. He saw he was exposed to Mr. Skinner’s immunized statements and information and worked closely with Mr. Skinner on the *Pickard* case. Agent Nichols “coordinated” with Agent Kidwell just as suggest by AUSA Hough in his July 10, 2003 email to AUSA Litchfield. The coordinating of the DEA investigation with Agent Nichols taints the Tulsa DEA investigation because the DEA Agents are using information obtained through immunized disclosures to obtain leads, strategize, identify witnesses and focus the investigation on Mr. Skinner. All of this has been determined by the Courts to be unacceptable. During this tainted investigation the DEA investigated the allegations that provide the basis for the charges in the present case and gathered evidence regarding those allegations.

After developing evidence through the tainted investigation DEA Agents Kidwell and his partner Agent Weaver spoke to, met with, gave notes, gave reports and other information to Corporal Watkins, tainting Corporal Watkins evidence and investigation as well.

Not only did the Tulsa DEA Agents coordinate their investigation with DEA Agent Nichols, this entire investigation can be traced back to Mr. Skinner’s immunized disclosures. After receiving immunity on October 12, 2000 Mr. Skinner provided the government with immunized statements and other sources of information. One of those sources was Crystal Cole. The government was not aware of Ms. Cole’s identity as a source of information in these matters prior to Mr. Skinner’s introduction of her to the DEA Agents. After introducing Crystal 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. 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.

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 10th 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. [2]

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

[2] Evidence of this will be introduced during the August 5, 2005 Kastigar Hearing

disclosures and testimony. (See Attached Exhibit D, DEA Form 6, June 12, 2003 debriefing of Krystal Ann Cole)

Agent Hanzlick was identified by AUSA Hough as being one of the lead agents that worked with Skinner. It was suggested that AUSA Allen Litchfield have the DEA Agents conducting the investigation on Mr. Skinner coordinate with Agent Hanzlick. We know from the DEA 6 forms turned over to the defense in discovery that this is exactly what happened; in fact Agent Hanzlick is the individual that set the meeting up.

The DEA investigation is directly tainted by the involvement of DEA Agent Karl Nichols, DEA Agent Roger Hanzlick and Krystal Cole. All three were exposed to Mr. Skinner's immunized disclosures and all three can be directly traced back to Mr. Skinner's original immunity agreement. And the tainted information from the DEA investigation was passed on to Corporal Watkins through DEA Agents Doug Kidwell, Rick Weaver and AUSA Allen Litchfield.

Evidence of Taint from the Kastigar Hearing

On the 25th day of May, 2005 Corporal Gene Watkins testified during the Kastigar Hearing in this matter. There were a number of facts established during that hearing. Some of those facts are highlighted below.

1. <u>The DEA Assisted Corporal Watkins In Contacting State's Witness William Hauck</u>

During the hearing Corporal Watkins testified to this.

> Q. …..you were able to get into contact with Mr. Hauck through Rick Weaver's Assistance?
>
> A. That's Correct

Kastigar Hearing Transcript pg. 40 Lines 2 - 4

In fact Corporal Watkins was even unaware of Mr. Hauck's identity without assistance from Mr. Weaver.

> Q. So you were unaware of Mr. Hauck, even his identity without the assistance from Mr. Weaver?
>
> A. At that time, no, I did not.
>
> *Kastigar Hearing Transcript pg. 40 Lines 11 – 13*

2. <u>The DEA Assisted Corporal Watkins in Looking for State's Witness Christy Roberts</u>

> Q. Okay, but here's the issue, you contacted the DEA and told them you were looking for Christy Roberts, and they assisted you in trying to find Christy Roberts?
>
> A. Correct
>
> *Kastigar Hearing Transcript pg. 41 Lines 2 –5*

3. **<u>The DEA interviewed State's Witnesses William Hauck and Christy Roberts concerning the allegations of this case Prior to Corporal Watkins interviewing those witnesses</u>**

> Q. Now, isn't it your understanding that Mr. Hauck had already discussed these events with the DEA prior to your talking to him?
>
> A. Yes
>
> Q. Is it your understanding that Christy Roberts had already discussed these events with the DEA prior to you talking with her?
>
> A. I know that they had—yes.
>
> *Kastigar Hearing Transcript pg. 35 Lines 16-23*

4. **<u>The DEA turned over notes from their investigation to Corporal Gene Watkins</u>**

   Q. And I want to talk, I don't think it is entirely clear, you said that you know you did see some DEA reports?

   A. Well, I'm not sure, I didn't see reports. It wasn't DEA reports, it was just some notes that they made and I don't---

   Q. Okay? And here's the question: The notes they made was from what? What were those notes in reference?

   A. Reference to this case

   Q. Okay. In reference to this case?

   A. Yes.

   Q. Okay. And they, who is they?

   A. Came from the DEA,….

   Kastigar Hearing Transcript pg. 48 Lines 1-13

5. **<u>In addition to the notes the DEA gave Detective Watkins a Report on Background Checks of the Witnesses</u>**

   Q. Corporal did you receive anything from the Drug Enforcement Agency?

   A. Later they gave me a report on some of their background checks that they had done.

   Kastigar Hearing Transcript pg. 28 Lines 1-4

6. **<u>That Corporal Watkins Had Numerous Contacts with the DEA Agents Concerning this Case</u>**

   I. Contacted DEA Agent Rick Weaver to see if DEA working the case. Tr. Page 12

      Line 19

II. Talked with Rick Weaver to see if he could get a hold of truck driver. Tr. Pg 19 Line 9

III. Obtained DEA report on back ground checks. Tr. Pg. 28 Line 3

IV. DEA wanted information on Christy Roberts. Tr. Pg. 37 Line 2. This establishes Corporal Watkins and DEA must have had some conversation regarding her interview because he specifically asked her a question the DEA wanted to know. (A tape of her interview will be played during the next evidentiary hearing)

V. DEA gave Corporal Watkins the name of Christy Roberts Attorney. Tr. Page 40 Line 17.

VI. Obtained DEA notes in reference to this case. Tr. Page 48 Line 1

VII. Spoke with DEA Agent Kidwell DEA Agent Weaver's partner, does not know who he talked with first. Tr. Page 51 Line 23 and TR. Page 52 Line 2

VIII. Spoke with the DEA Agents at the Federal Court house. Tr. Page 54 Line 19-21

IX. Unsure whether he had been to their office on this case. Tr. Page 54 Line 23-25

X. Meet with DEA Agent Kidwell at the station and believes that is when he got the DEA notes. Tr. Pg. 55 Line 3. (However, Corporal Watkins cannot tell us which Agent gave him the DEA notes, he cannot remember. "I can't tell you positively which one gave me the notes or how I came upon them". Tr. Page 55 Line 18-20)

7. <u>Corporal Watkins Also obtained information about this case from AUSA Allen Litchfield</u>

Q. (By Mr. Robertson) And you learned from Alan Litchfield at some point, who is an assistant U.S. Attorney, that there would be no federal charges filed?

A. That was secondary. I was first told by---what happened, I was first told by them, that's when I started working it. Tr. Page 61 Line 13-18.

Allen Litchfield participated in the DEA investigation in this matter and spoke directly with DEA Karl Nichols who was the case agent for the case that Mr. Skinner provided immunized testimony for. This is clear from the email between AUSA Greg Hough, who handled the *Pickard* trial that Mr. Skinner was given immunity for and AUSA Allen Litchfield, from the Northern District of Oklahoma.

> The lead DEA agents were Karl Nichols, Oakland California. 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 C Bates page 385 Email between AUSA Litchfield and AUSA Hough.)

In other emails Allen Litchfield request and is given Mr. Nichols phone numbers and then begins corresponding with Mr. Nichols. (See attached Exhibit C Bates page 385 Email between AUSA Litchfield and AUSA Hough.)

8. **Corporal Watkins Cannot Say What Information he Got From the DEA**

In response to a cross-examination question asking Corporal Watkins whether the DEA relayed information to him concerning what witnesses might say the Corporal gave this response;

A. ……..So, whether the DEA tells me something or the father tells me something, its hard to say which one—where we got more information from.
Tr. Page 34 line 24

OTHER EVIDENCE OF TAINT

1. **Detective Watkins asked William Hauck to obtain witness contact information from the DEA concerning Bill Wynn, a potential witness involving the allegations of this case.**

   A. I left, uh, in Bill Wynn's car to go see my daughter and my girlfriend, and I returned about noon on the 5th.

   Q. O.K. How old is Bill Wynn?

   A. Uh, he's 35 to 40 years old.

   Q. O.K. Do you know where he lives?

   A. I don't have his address and phone number on me, but that's….that's available through the other agents I've been talking to (inaudible)

   Q. O.K. But if I …if I want to get it, you could get it for me?

   A. Yes

   Q. O.K. Go ahead.

   (See attached exhibit E, page 5 and 6 of August 16, 2003 transcript of Bill Hauck's statement)

2. **William Hauck was working closely with the DEA And Passing Information From the DEA Investigation to Corporal Watkins**

During Corporal Watkins's interview with William Hauck, Hauck admits that he is working closely with the DEA. He is refers to DEA Agents Rick Weaver and Doug Kidwell by their first names and he has knowledge of the DEA's investigation of Mr. Skinner and passes that information onto Corporal Hauck.

> A. I'm…I'm terrified right now. Hey, I ..if...if I was not working in such close conjunction with Rick and Doug at the DEA, and if I wasn't in here talking with you, and I was just driving my truck, I guarantee you that I would have a…a…a piece within reach. [3]

(See attached Exhibit E page 40 of August 16, 2003 transcript of Bill Hauck's statement)

William Hauck is also aware that the DEA has interviewed Christy Roberts or "Chris" as he calls her and he passes that information along to Corporal Watkins along with his opinion that Corporal Watkins could obtain her contact information through the DEA, <u>which is exactly what Corporal Watkins does</u>.

> A. ….Her name was, uh, Chris. I don't know her last name.
>
> Q. O.K.
>
> A. Uh, but again, her name and address and all that stuff, the…she's spoken to the …the other agency.
>
> Q. O.K. And you're talking about the DEA when you say other agency?
>
> A. Yes.

(See attached Exhibit E page 7 of August 16, 2003 transcript of Bill Hauck's statement)

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[3] William Hauck is a convicted felon. His possession of a firearm would be a state and federal offense.

During his interview with Corporal Watkins William Hauck gives Detective Watkins information concerning Michael Chasten that he obtained during his cooperation with the DEA.

> Q. O.K. Have you had any conversation with Crystal since ten?
>
> A. Uh, just with Todd. Uh, they ….I met them in Broken Arrow at Michael Shawn's house on two occasions.
>
> Q. What's his name?
>
> A. Michael Shawn Chasten.
>
> (See attached Exhibit E page 37 of August 16, 2003 transcript of Bill Hauck's statement)

However, after William Hauck only found out Michael Shawn's last name after meeting with Mr. Skinner for the DEA.

> …..The SOI also stated that he/she discovered that Michael Sean's last name is Chasten.
>
> (See Attached Exhibit F Paragraph 7 of attached DEA 6 form, Bates page number 341-342 turned over in discovery and page 4 of Hauck's Interview with Watkins) [4]

The State Has Informed Defense That Corporal Watkins

[4] In the DEA report William Hauck is identified as SOI however it is clear that this individual is Hauck because of the reference to the Shawnee Motel. See attached Exhibit page 4 of the August 16, 2003 William Hauck Statement)

Cannot Produce the Notes Turned over to Him by the DEA

During the Kastigar Hearing Corporal Watkins referred to notes given to him by the DEA that were in reference to this case. Corporal Watkins said he would look to see if he had a copy of those notes. Defense counsel has been informed by ADA David Robertson that Corporal Watkins cannot produce those notes. During the hearing Detective Watkins testified that he believed that everything that he had would have been turned over to the District Attorney's office. ADA Robertson informs defense counsel that the notes have not been turned over to him. The significance of this is that the state cannot meet its burden of affirmatively proving where the evidence and information they intend to use came from.

APPLICATION OF THE EVIDENCE TO THE LAW

Taint of DEA Investigation

The DEA investigation is directly tainted by the involvement of DEA Agent Karl Nichols, DEA Agent Roger Hanzlick and Krystal Cole. All three were exposed to Mr. Skinner's immunized disclosures and all three can be directly traced back to Mr. Skinner's original immunity agreement. Without Mr. Skinner's immunized statements the government would not have been aware of Krystal as a witness and she would never have met Agent Hanzlick either. And the tainted information from the DEA investigation was passed on to Corporal Watkins through DEA Agents Doug Kidwell, Rick Weaver and AUSA Allen Litchfield. The individual involvement of any of the three witnesses taints the investigation the involvement of all three of the witnesses just makes the tainting of the investigation that much worse.

The law is clear. A defendant's immunized statements cannot be used to as an **investigatory lead** and cannot be used to **focus an investigation** on a witness as a result of his compelled disclosures. See Kastigar v. United States, 406 U.S. 441, 460 (1972). That is **exactly** what was done in this case. The proof of that comes in form of the email turned over to the defense by the state in which AUSA Hough tells AUSA Allen Litchfield that he should coordinate between the Tulsa DEA Agents and the case agents who were familiar with Mr. Skinner through his immunized disclosures.

> The lead DEA agents were Karl Nichols, Oakland California. 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 C Bates page 385 Email between AUSA Litchfield and AUSA Hough.)

Not only was this suggested but we know that this happened because in a latter email Agent Nichols confirms that he had conferred with the Tulsa Agents.

In the July 16, 2003 email Karl Nichols, one of the lead agents on the *Pickard* case emails Allen Litchfield and says;

> I spoke with Doug Kidwell, before Skinner came in, to give him the details of the guy. I'll bet you had a very interesting interview.
>
> Karl

(See attached Exhibit C Bates page 385 Email between AUSA Litchfield and AUSA Hough.)

The agents were using information obtained through immunized leads to strategize, coordinate and focus their investigation on Mr. Skinner.

There will be further evidence of this introduced during the August 5, 2005 hearing. When Mr. Skinner and his attorney visited the DEA to confront the Agents concerning the illegal investigation that they were conducting something unusual happened. Upon arrival Mr. Skinner and his counsel, H.I. Aston, were thoroughly searched by the Agents. What is unusual about this is that Mr. Skinner has recorded DEA Agents in the past doing and saying things that they were not supposed to. When Mr. Skinner was thoroughly searched prior to the meeting he knew that these agents had been speaking with DEA Agents that had dealt with him in the past.

Furthermore, Agent Hanzlick on of the agents that had dealt with Mr. Skinner in the past set up the meeting between Tulsa DEA Agents and Crystal Cole. (See Attached Exhibit D)

The statute requires that evidence be excluded to deter police abuses and to place Mr. Skinner and the government in the same position it would have been without the disclosures.

> The statute requires not only that evidence be excluded when such exclusion would deter wrongful police or prosecution conduct, but that the witness be left in substantially same position as if he had claimed the Fifth Amendment privilege.
>
> United States v. Kurzer, 534 F.2d 511, paragraph 39 (2nd Circuit 1976) (Internal Citations Omitted)

To place Mr. Skinner in the same position as he would have been had he asserted his Fifth Amendment all evidence and information derived either directly or indirectly from the DEA must be excluded. (The state's problem is that according to Corporal Watkins he cannot distinguish what evidence came from the DEA and what came from other sources.)

It is important to note that not only does the statute forbid the use of evidence from immunized disclosures but it also forbids the use of **information**.

> ….[N]o 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…
>
> 18 U.S.C. 6002

The DEA investigation of Mr. Skinner relied on evidence and information from Mr. Skinner's immunized disclosures and is therefore tainted. Clearly this fails within the prohibition established under § 6002 and is not permitted.

> 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).

Kastigar Hearing

The prosecution has the "affirmative duty to prove the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Kastigar v. United States, 406 U.S. 441, 460 (1972). However, during the Kastigar hearing the state called Corporal Gene Watkins who not only failed to establish that the evidence was derived "wholly independent" of the compelled testimony but Corporal Watkins established that evidence the prosecution proposes to use is "**wholly dependent**".

1. Corporal Watkins admitted that he received notes in reference to this case from the DEA.
2. Corporal Watkins admitted that he spoke with DEA agents in reference to this case on numerous occasions.

3. Corporal Watkins admitted that he received background reports from the DEA in reference to witnesses in this case.
4. Corporal Watkins located states witness William Hauck with the assistance of the DEA.
5. Corporal Watkins did not even know of the identity of William Hauck without the DEA's assistance.
6. Corporal Watkins sought and received the DEA's assistance in attempting to locate state's witness Christy Roberts.
7. Corporal Watkins admitted that the DEA had interviewed state's witnesses Christy Roberts and William Hauck prior to his interviewing of those witnesses.
8. Corporal Watkins admitted that he spoke with DEA Agent Kidwell in reference to this case and said he believed that Agent Kidwell came down to the police station in reference to this matter.
9. Corporal Watkins Cannot Say What Information he received from the DEA.

In response to a cross-examination question asking Corporal Watkins whether the DEA relayed information to him concerning what witnesses might say the Corporal gave this response;

> A……..So, whether the DEA tells me something or the father tells me something, its hard to say which one—where we got more information from.
> Tr. Page 34 line 24

(The importance of this testimony is that this makes it impossible for the state to meet its burden of proof. If Corporal Watkins cannot say which information he received from the DEA and which information he received from Brandon Green's father the state cannot prove that their evidence is wholly independent of the immunized disclosures just as without the notes he cannot prove what information he recieved)

10. Corporal Watkins received information from Allen Litchfield concerning this case. (This is significant because AUSA Allen Litchfield coordinated the DEA investigation with DEA Agent Karl Nichols one of the lead agents when Mr. Skinner provided his immunized disclosures. It is improper for investigators to use information obtained from immunized disclosures to obtain leads, strategize, identify witnesses and focus an investigation upon a defendant. That is exactly what was done in this case.)

Corporal Watkins's investigation was wholly dependent upon the DEA's investigation. The DEA had already conducted the investigation, knew what the witnesses would testify to, knew the witnesses names and contact information, were familiar with Mr. Skinner and information obtained through his immunized disclosures and they used that information to focus their investigation upon Mr. Skinner. And then they turned that information over to Corporal Watkins.

When the Corporal needed to find out the identity of "Bill" the truck driver he called the DEA because they already knew. When Corporal Watkins needed help locating Christy Roberts he called the DEA because they had her contact information. Corporal Watkins received notes from the DEA in reference to this case because the DEA Agents had already interviewed these witnesses. AUSA Litchfield told Corporal Watkins what "happened" when he began investigating the case so Corporal Watkins knew where he was going the entire time. The DEA spoke with Corporal Watkins on numerous occasions and even gave Corporal Watkins questions to ask particular witnesses. Corporal Watkins obtained back ground reports from the DEA on the witnesses in this case.

The investigation by Corporal Watkins is not "wholly" independent as required by law. It is wholly **dependent**. Corporal Watkins simply retraced the investigative steps that were already mapped out for him

by the DEA Agents. He located and interviewed witnesses with their assistance. He asked questions he already knew the answers to because the DEA had already told him what happened and had given him their notes in reference to this case. This is exactly what the statute was intended to prevent. Not only has the state failed to meet its burden, that the evidence it intends to use is wholly independent, Corporal Watkins has established that the opposite is true; His investigation was wholly dependent upon the DEA investigation. The more that comes out about this case the clearer the picture becomes about what really occurred with the investigation.

Conclusion

Those individuals who are charged with enforcing the law should be required to follow it. And it is clear in this case that Gregory Hough, an Assistant United States Attorney, and Agents from the DEA chose to ignore the law because of a personal dislike for Gordon Todd Skinner. This could not be more clearly demonstrated than in Mr. Hough's July 10, 2003 email to AUSA Litchfield when he stated;

> *…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 Exhibit C, Emails between Litchfield and Hough)

Instead of following the law these individuals used the power and position entrusted to them by the citizen's of this country to settle a personal vendetta against Mr. Skinner. These individuals were upset because in their minds Mr. Skinner caused an "OPR investigation of all involved". See Exhibit C, Emails between AUSA Litchfield and Hough, specifically Hough's July 10, 2003 Email to Litchfield)

This case is exactly what §6002 and *Kastigar* were designed to prevent.

> 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).

And the burden established by 6002 and *Kastigar* was designed to ensure that the Defendant was not required to rely upon the good faith of the investigators and prosecuting authority.

> A person accorded this immunity under 18 U.S.C. 6002, and subsequently prosecuted, is **not dependent for the preservations of his rights upon the integrity and good faith of the prosecuting authorities**.
>
> Kastigar v. United States, 406 U.S. 441, 460 (1972)

While the defense does not question that Mr. Robertson is acting in good faith it is clear from the emails turned over in discovery that AUSA Hough and the DEA Agents involved were not acting in good faith.

But this motion is about more than Gordon Todd Skinner and whether this case proceeds. This motion is about the rule of law. As written by Justice Brandeis and Justice Holmes in *Olmstead v. United States;*

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.
>
> *Olmstead v. United States;277 U.S. 438, 485 (1928)*

It is of great importance for this Court to hold the government to its burden;

> When judges appear to become accomplices in the willful disobedience of a Constitution they are sworn to uphold, we imperil the very foundation of our people's trust in their government on which our democracy rests.
>
> United States v. Calandra, 414 U.S. 38, para. 62 (1974)

Holding the government to the requirements of the law actually benefits law enforcement,

> However much in a particular case insistence upon such rules may appear as a technicality that insures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness
>
> Miller v. United States, 357 U.S. 301, 313 (1958)

For all of the reasons laid out in this motion, the previous motions and submitted in the evidentiary hearings Counsel urges this Court to grant Mr. Skinner's motion to dismiss.

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 August 4, 2005 to the office of the following:

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

_____
Kevin D. Adams