No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 2002

GLENN H. MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. PETITIONER MARTIN'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A *KASTIGAR* CLAIM.

II. A *KASTIGAR* IMMUNITY CLAIM IS NOT SUBJECT TO HARMLESS ERROR REVIEW.

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, **GLENN H. MARTIN**, respectfully prays that a writ of certiorari issue to review the decision of the Eleventh Circuit Court of Appeals entered November 6, 2002 affirming without written opinion the denial of a certificate of appealability ("COA") by the United States District Court for the Middle District of Florida, of an appeal of a denial of a petition for relief under Title 28 United States Code, § 2255, based on an immunity claim under *Kastigar v. United States*, 92 S.Ct. 1653 (1972).

OPINION AND DECISION BELOW

The decision without opinion of the Eleventh Circuit Court of Appeals (Appendix., *infra*) was unreported. The decision and opinion of the Middle District of Florida denying relief under 28 U.S.C. § 2255 was also unreported but a copy of that decision and opinion is included in the Appendix, *infra*.

JURISDICTION

Petitioner GLENN H. MARTIN filed in the United States District Court for the Middle District of Florida, Orlando Division, a timely motion under 28 U.S.C. § 2255 attacking the judgment and sentence in his federal criminal case. The motion raised a number of grounds, only one of which is pertinent to this petition, a *Kastigar* immunity claim. The District Court granted Petitioner Martin an evidentiary hearing on the *Kastigar* immunity claim, took evidence, then enter a twenty-seven page written order denying relief. Petitioner Martin then filed a request for a certificate of appealability ("COA") and a notice of appeal of the order denying relief on his § 2255 petition. The District Court denied the request for a COA, which Petitioner Martin then appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit Court of Appeals denied the appeal of the denial of the COA without a written decision by its order dated November 6, 2002. This petition followed in a timely manner. This Court has jurisdiction to review the decision of the United States Court of Appeals

for the Eleventh Circuit pursuant to Title 28 U.S.C., § 1254(1). *Hohn v. United States*, 118 S.Ct. 1969, 141 L.Ed.2d 242, 66 U.S.L.W. 4489 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution provides:

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS MATERIAL TO THE ISSUES PRESENTED

Glenn H. Martin's convictions arose out of his operation of Twentieth Century Life Insurance Company ("TCL"), an insurance company that did business in several States, including North Carolina and Florida. TCL was a wholly- owned subsidiary of a Florida holding company, Twentieth Century Financial Corporation of America ("TCFCA").[1] Martin was the chief executive officer ("CEO"), president, majority stockholder, and chairman of the board of directors of TCFCA, and Cooper, Martin's sister, was the corporate secretary of TCFCA, as well as a member of its board of directors. Martin was also the CEO, president, and chairman of the board of directors of TCL, and Cooper was TCL's executive vice president.

As an insurance company doing business in North Carolina and Florida, TCL was subject to regulation by the North Carolina Department of Insurance ("NCDOI") and the Florida Department of Insurance ("FLDOI"). Both of these agencies required that insurance companies maintain specific minimum ratios of assets to liabilities and surplus. If an insurance company operated below these minimum ratios, NCDOI and FLDOI were authorized to bar the company from doing further business in their respective States because of statutory insolvency.

Because the valuation of assets had a critical bearing on the calculation of these

[1] Martin's sister, Candace Cooper ("Cooper"), was also convicted in this case.

ratios, NCDOI and FLDOI regulated the accounting treatment of assets by insurance companies. For example, neither of the agencies allowed insurance companies to treat loans or advances to "related" companies - companies with common ownership or management-as assets. Due to these and other regulations on the valuation of assets, it was possible for an insurance company to be declared statutorily insolvent and, therefore, subject to regulatory shutdown and takeover, despite the fact that, under generally accepted accounting principles, the company's assets exceeded its liabilities.

TCL sold various types of insurance policies, including single premium, whole life policies and single premium annuities. These policies would accumulate cash values that could be redeemed by the policyholder under certain conditions specified in the policy. These policies also required TCL to pay death benefits upon the death of the insured. TCL had the primary responsibility to make any payments to policyholders. However, under the laws of North Carolina and Florida, the North Carolina Life, Accident and Health Insurance Guaranty Association and the Florida Life and Health Insurance Association (the "Guaranty Associations") were required to reimburse all policyholders of life insurance companies located within their respective States that became insolvent or otherwise failed.

From 1984 through June 1989, Martin caused TCL to loan or advance

substantial sums of money to other companies controlled by Martin. Although NCDOI initially was unaware that TCL was engaging in these related-party transactions, it increasingly became concerned about the apparent illiquidity of TCL's assets as the percentage of TCL's assets in the form of business accounts receivable from a few companies continued to escalate. This concern led NCDOI to become more aggressive in its efforts to learn about TCL's assets, which, in turn, led to the discovery that TCL had engaged in extensive related-party transactions.

Although NCDOI could have shut down TCL for fiscal unsoundness once it discovered the related-party transactions, it instead entered into a consent agreement with TCL under which TCL would continue doing business subject to strict supervision by NCDOI. Among other restrictions, the consent agreement required TCL to receive NCDOI approval before making any disbursements from TCL bank accounts. Shortly after the execution of this June 8, 1994 consent agreement, FLDOI issued a series of consent orders relating to TCL's business in Florida. The orders severely limited the amount of new business TCL could write in Florida and required TCL to make a variety of disclosures to FLDOI concerning TCL's new business and its reserves.

The indictment charged Martin and Cooper with devising and executing a scheme to divert, conceal, and ultimately convert approximately $9,750,000 in funds

received by TCL as premiums for certain annuities and single premium, whole life polices. According to the indictment, defendants issued policies in exchange for the converted premiums, but concealed the sale of the policies and TCL's receipt of the premiums from NCDOI and FLDOI by avoiding TCL's standard operating procedures for documenting the issuance of policies and the receipt of premiums. Instead of processing these policies and premiums in the usual fashion, Cooper maintained the records in a separate word processing file and handwritten log. The files regarding these policies were also stored separately from TCL's other policy files, either in Cooper's office or in the trunk of Cooper's car.

Between July 1989 and August 1990, Martin, Cooper, and others deposited approximately $9,750,000 in premiums from these policies into bank accounts that had not been reported to NCDOI or FLDOI. These accounts were owned and controlled by Martin. The funds were ultimately disbursed by Martin for his personal use or were funneled to other corporations that he owned. Although Cooper did not receive any of these funds, she was aware that the premiums were being deposited in the unreported accounts and handled the premiums in a manner that prevented NCDOI and FLDOI from discovering the existence of the premiums.

On March 1, 1991, NCDOI declared TCL statutorily insolvent and assumed the company's operation. However, the agency was unable to cure TCL's financial

problems, and the company ultimately failed. As a result, the North Carolina Guaranty Association was statutorily obligated to assume the liabilities of all TCL policyholders up to $300,000 each.

Facts Pertinent to Immunity Issue

On or about February 1, 1991, NCDOI[2] wrote Martin (hereinafter sometimes referred to as the "February 21, 1991 Letter") threatening him with criminal prosecution under various North Carolina statutes, based on a letter dated January 21, 1991 sent by TCL to its policyholders concerning the assets of TCL. NCDOI demanded in the February 21, 1991 Letter that Martin personally explain "under oath:"

(1) Whether the January 21, 1991 letter was genuine and had been signed by Martin;

(2) Whether the letter was sent to anyone and if so, to whom;

(3) The name of the person who drafted the letter;

(4) The names of all persons who saw the letter before it was mailed, including any legal counsel;

(5) The financial statement which was relied upon in making the statements in the letter;

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[2] The letter is signed by Jim Long.

(6) The assets and liabilities of TCL as of December 31, 1990.

Martin was required to furnish his answers to these questions under oath to NCDOI no later than February 10, 1991.

In addition NCDOI in the February 1, 1991 letter required Martin to appear in person at NCDOI to be examined under oath:

(1) concerning the January 21, 1991 letter;

(2) his activities as President of TCL; and

(3) the financial status and affairs of the company.

Martin complied with the demand for an affidavit by submitting an affidavit on or about February 8, 1991 admitting that he was the author of the letter and had signed it and had it go out to policy holders under his name. This turned out to be a key incriminating statement, because it was the position of the NCDOI that this letter fraudulently misrepresented the financial position of the company.

On February 8, 1991 Associate Attorney General Anita L. Quigless of the North Carolina Department of Justice followed up with a letter to Robert W. Boyd, Esq., counsel for Martin, advising that the deposition demanded in the February 1, 1991 NCDOI letter was to be held February 21, 1991 at NCDOI. Cooper was also required to appear. This letter further advised that Martin would be questioned about financial data requested but not provided to NCDOI.

The deposition of Martin and Cooper was conducted by V. Lane Wharton, Esq. and Anita L. Quigless, Esq. on behalf of NCDOI and William S. Patterson, Esq. on behalf of North Carolina Accident and Health Insurance Guaranty Association on February 27, 1991 commencing at 9:05 a.m. TCL was represented by Larry McDevitt, Esq., Financial Security Corporation was represented by Luke Hyde, Esq.. Also present for the deposition were Alex Spencer, Senior Deputy Commissioner, NCDOI, Steven C. Gregory, Assistant Chief Examiner, NCDOI, Melvin J. Dillon, Special Deputy Commissioner, NCDOI, and Joseph B. Holloway, Jr., Examiner, NCDOI.[3] The deposition continued virtually all day and the written transcript ran several hundred pages.

Shortly after the submission of the compelled affidavit and the deposition, TCL was taken into receivership on March 1, 2001, just three days after the deposition. No later than May 1991 a federal criminal investigation had started.

The *Kastigar* Hearing Held on Martin's Subsequent 28 U.S.C. § 2255 Petition

The evidence from the *Kastigar* hearing showed that the federal criminal investigators and federal prosecutors had access to the deposition and affidavit of

[3] Holloway and Spenser were the key government witnesses at trial. Holloway had an office in the United States Attorney's Office in Orlando and worked alongside the case agents putting the case together prior to trial.

Martin and access to Spenser, Holloway, and counsel for NCDOI who had deposed Martin prior to the decision to indict and prior to presenting any evidence to the grand jury. The government candidly conceded that at no time did the government consider the immunity implication of the deposition and affidavit Martin was compelled to give. The government took no steps to assure that its case was not tainted by the immunized material. The government did not obtain DOJ approval for the indictment of Martin despite the fact that Martin had obtained use immunity from his compelled testimony.

Cheney Mason was retained by Martin on or about September 1991. Mason was aware of the deposition of Martin and the affidavit Martin was compelled to provide NCDOI.

Martin was indicted in November 1994 and tried in July and August 1995. Martin was represented by Mason at trial and Cooper was represented by John Lauro at trial. Martin and Cooper, through their counsel, entered into a joint defense agreement to share confidential information and defense strategy. At no time did the defense counsel consider the possibility that there was an immunity defense. No strategic choice was considered or discussed with the defendant to forego an immunity defense. At the evidentiary hearing Martin's trial counsel testified that he never considered an immunity issue and that there was no strategic choice made to

forego an immunity challenge to the indictment or otherwise. The government did not dispute and the district court accepted this testimony of the trial counsel, Cheney Mason.

The indictment and the trial of Martin's case was tainted by his immunized statements. At least two of the key government witnesses, Spenser and Holloway, one of whom is known to have assisted the prosecution team in putting the case together, actually sat through Martin's deposition while their agency's counsel compelled Martin to testify across several hundred pages of material that was clearly pertinent to the decision to put the company into receivership, leading three months later to the federal criminal investigation. It was also established that the case agent, Brister, had the deposition transcript prior to his grand jury testimony and he was the key witness before the grand jury. Agent Brister testified at the evidentiary hearing that it was even possible that the grand jury had access to the Martin deposition.

The government conceded that Martin's compelled affidavit was actually introduced at trial as a government exhibit, because the basic thrust of the government's case was that the letter that the affidavit addressed was a mail fraud that was what started the NCDOI investigation.

AUSA Thomas Turner also disclosed that he had prepared to cross examine Martin, had Martin testified at trial, by going through the deposition transcript and

preparing thorough notes for cross-examination.[4] Both AUSA Turner and AUSA James Glazebrook had access to and reviewed the compelled deposition and affidavit of Martin before indictment and trial. Case Agent Brister testified at the evidentiary hearing that it was possible the grand jury itself was given access to the deposition, because the procedure was to simply make all documents obtained in the course of the investigation available to the grand jury. Given that the government did not consider there were any immunity concerns attendant on the deposition and affidavit it can be assumed that the government would have made the deposition available to the grand jury as was the government custom with all documents in the case.

In the evidentiary hearing Agent Brister did prepare a chart to show from the *trial evidence* how each part of the indictment was established by some independent source document which was in turn an exhibit at trial. But when the District Judge turned to Agent Brister and asked the $64,000 questions - did you have all of those exhibits before the indictment? After Agent Brister said yes, AUSA Turner, who is noted for his professionalism and integrity corrected the Agent and told the Court that no, they did not have all of the "independent source" exhibits before the indictment. The Court left the issue hanging and did not require the government to go forward to

[4] Martin did not testify at trial, indeed it would have been hard to do so given that Martin knew that the government was holding his deposition and could cross-examine him on it.

identify which documents were available at the time of the indictment and which were only obtained later, thus the government did not began to establish independent source for the indictment itself, much less do any review of the grand jury testimony.

The District Judge's Order Denying Relief on the § 2255 *Kastigar* Claim

The District Judge concluded that Martin did not have immunity because there was no economic compulsion:

> "The immunity delineated in *Lefkowitz*, therefore, is inapplicable here because there was no economic compulsion. For this reason Martin's petition must fail."

This finding was clearly erroneous. The finding was based on the judge's conclusion that TCL had been taken into receivership *prior to the deposition.* The judge made a finding that TCL had been taken into receivership on February 14, 1991, two weeks prior to the deposition. Instead it was the other way around. The deposition and an accompanying affidavit was compelled by the threat of receivership made by NCDOI in a letter to Martin dated February 1, 1991. Martin complied with the order under the threat of receivership and submitted the affidavit it demanded on February 8, 1991, and sat for the day long deposition on February 27, 1991. The NCDOI then took the company into receivership three days later, on March 1, 1991. These are

historical facts that are in the record below. The judge just got it wrong, and everything else flowed from that mistake.

The judge's conclusion, which rests on a mistaken reading of the record, is clearly erroneous and the government will agree if asked, that the judge had the time line wrong. The government presented no evidence and never argued that the receivership came first. There is no question but that Martin was threatened with personal criminal penalties and threatened with having TCL taken into receivership if he did not provide the affidavit and answer the deposition questions. The evidence is not in conflict on this point. The government has never disputed Martin's position that he was threatened with criminal penalties and the receivership of his company, TCL, if he refused to respond. There is nothing in the record to support the District Judge's mistaken conclusion that the receivership came before the deposition and affidavit. The District Judge's decision that Martin did not have immunity rested on this clearly erroneous conclusion.[5] The District Judge misapplied *Lefkowitz* because he misread the record.

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[5] If nothing else we would respectfully request this Honorable Court request the Solicitor General confirm this assertion. It is true and the Solicitor General, if he checks with the United States Attorney will confirm what we have represented about the District Judge's mistake. The Assistant United States Attorney who tried the case and handled the evidentiary hearing on the *Kastigar* issue, Thomas Turner, has recently resigned from the United States Attorney's office in Orlando to assume a State of Florida Circuit Court Judgship in Orlando, Florida.

The District Judge based his denial of the *Kastigar* issue on alternative grounds. His alternative ground for denying relief was because he claimed "no evidence derived from any such statement was used to convict him [Martin]."

This conclusion is also factually wrong and clearly erroneous. If nothing else, the crucial affidavit was actually introduced in the criminal trial as a government exhibit in its case against Martin. The government has never disputed that the affidavit that Martin was compelled to give on the crucial "smoking gun" letter, which the NCDOI and the United States claimed was the basis for a fraud charge, and which was the key which opened the door to the entire investigation and criminal charges was entered into evidence by the government in Martin's trial.

The District Judge simply ignored the taint that the immunized evidence had on the grand jury indictment process. *The District Court made no finding that Martin's indictment was not tainted by the compelled testimony or affidavit.* The District Court implicitly accepted the government's mistaken argument that once the case proceeded to trial with no pre-trial motion to dismiss the indictment on immunity grounds, that the District Court did not have to analyze the testimony before the grand jury to determine if it were tainted by immunized evidence or not.

If that analysis had been made it would have had to have failed because we know that the case agent had relied on and used the deposition and the affidavit

before he ever appeared before the grand jury. This might be right in a motion for new trial, but Martin was presenting this issue in a collateral attack on the conviction in which Martin had framed the issue below as ineffective assistance of counsel for failing to bring either a pretrial or post-trial motion to dismiss. As an ineffective assistance of counsel issue, the District Court needed to examine the impact of the ineffectiveness of counsel at each stage of the proceeding. The trial attorney could have and should have raised an immunity challenge to the indictment and was ineffective in failing to do so. That was Martin's argument and that argument cannot be answered without a determination whether Martin was prejudiced by his trial counsel's failure, and that in turn cannot be answered without applying a *Kastigar* review *to the indictment* because that is what Martin could have insisted on *before trial* had his trial lawyer been doing his job. By limiting the collateral attack review of the *Kastigar* issue to a review of the trial evidence the District Court denied Martin the hearing he was entitled to.

The District Court failed to conduct the hearing required by *Kastigar* that it go through the grand jury testimony line by line and require the government to disprove taint. No such effort was made by the government below. The government made no attempt to meet its burden or proof under *Kastigar* nor did the District Court require the government to meet its burden. The order denying relief in this case focuses

entirely on the *trial* evidence with no consideration given to the effect of the immunity on the *grand jury*. Martin expressly argued that resolution of the immunity issue required the government to disprove taint before the grand jury as well as trial, but the District Court disagreed at least by implication, because neither in the hearing nor in its order did it address the effect on the grand jury. The District Court erred in so holding.

Finally, the District Judge held the government to only a harmless error standard as to the trial evidence that it considered. We submit that immunity claims are not subject to a harmless error. No Supreme Court decision under *Kastigar* has ever enunciated a harmless error standard of review.

Instead, *Kastigar* itself speaks of "any use," and "total 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. s 6002.
>
> This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' [footnote 50]and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled

disclosures.

> Footnote 50. See, e.g., *Albertson v. Subversive Activities Control Board*, 382 U.S., at 80, 86 S.Ct., at 199.

A person accorded this immunity under 18 U.S.C. s 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in Murphy:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' 378 U.S., at 79 n. 18, 84 S.Ct., at 1609.

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 that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

This is very substantial protection, [Footnote 51] commensurate with that resulting from invoking the privilege itself. The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. This statute, which operates after a witness has given incriminatory testimony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.

Prohibition of "any use" and "total prohibition" is logically inconsistent with the notion of harmless error. Although no standard was articulated in *United States*

v. Hubbell, 530 U.S. 27, 120 U.S. 2037 (2000), we submit that *Hubbell* implicitly applied a *per se* reversal-dismissal standard to any use of immunized testimony.

ARGUMENTS

I. Petitioner Martin's Trial Counsel Was Ineffective for Failing to Raise a *Kastigar* Claim.

The Fifth Amendment provides a person with the right to be free from being involuntarily called as a witness against himself or from providing answers in any proceeding where those answers might incriminate him. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924). In ordinary circumstances, the right is not self-executing, as a person is required to invoke his right to remain silent. *Garner v. United States*, 424 U.S. 648 (1976). However, in proceedings where answers are required under threat of loss, the State must grant immunity in order to supplant the privilege. *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973). As a result, "once a defendant demonstrates that he has testified, under a state grant of immunity, the federal authorities have the burden of showing that their evidence is not tainted by establishing they have an independent, legitimate source for the disputed evidence." *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964). In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court made it clear that once some testimony is shown to be immunized, a hearing is required where the government must prove that its case is not

tainted by the immunized testimony.

In the instant case, Petitioner was compelled to testify at a deposition held by the North Carolina Department of Insurance (NCDOI) under threat of loss of his company. (Letter from Long to Martin, February 1, 1991, see attached appendix). Without being informed that he had a right to remain silent, he testified to matters that became the foundation of this case. Petitioner was required to receive immunity for this testimony, and therefore, under *Kastigar*, Petitioner was entitled to a pretrial hearing to determine whether the federal government had used this immunized testimony or immunized affidavit in its case against Petitioner. Such use would violate the Fifth Amendment, and taint the case against the Petitioner requiring the dismissal of the indictment. Petitioner's counsel was, therefore, ineffective in failing to demand a *Kastigar* hearing to determine whether the case against the Petitioner was tainted by immunized evidence.

The Petitioner established facts at the evidentiary hearing on his collateral attack sufficient to show that he was entitled to immunity for the compelled deposition and affidavit he gave the NCDOI and which was then shared with federal prosecutors prior to his indictment three months later. The government conceded that it had his immunized statements but had failed to implement any protections to prevent its criminal investigation from being tainted by its access to the immunized

materials. Instead, the government used the Petitioner's deposition to prepare for his cross-examination at trial and submitted the immunized affidavit into evidence at trial as a government exhibit. This alone is enough to show that Petitioner Martin was prejudiced by his counsel's failure to raise the *Kastigar* issue pretrial.

In addition, the government completely failed to make any showing and the District Court failed to make any finding that the government had an independent source for its *grand jury* evidence against Petitioner Martin, because the government took the position that it did not have any burden to show that the *grand jury* was not tainted by the immunized statements. The government's failure to meet its burden of showing that the grand jury indictment was from independent sources untainted by the immunized statements entitled Petitioner Martin to relief.

II. A *Kastigar* Immunity Claim Is Not Subject to Harmless Error Review.

The District Court concluded that Petitioner Martin's *Kastigar* claim was subject to harmless error analysis.[6] We submit that the very nature of immunity prohibits a harmless error standard. Although this Court has never expressly articulated the applicable standard of review for immunity claims, we argue that the correct standard, which is implicit in this Court's prior immunity holdings, is that

[6] We repeat, however, that the District Court failed to conduct *any analysis, harmless or otherwise* of the grand jury testimony.

once a defendant establishes any use, whether "harmless" or not, he is entitled to dismissal of the indictment or reversal of the conviction.

CONCLUSION

Based on the foregoing, Petitioner GLENN H. MARTIN respectfully requests this Honorable Court grant his petition for a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

THE LAW OFFICE OF
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_____

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APPENDIX A

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

GLENN H. MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

I, **WILLIAM M. KENT**, do declare that on this date, February 4, 2003, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and

with first-class postage prepaid.

The names and addresses of those served are as follows:

Mr. Glenn H. Martin
BOP Number 17796-018
Talladega FCA
565 East Renfroe Road
Talladega, Alabama 35160

Solicitor General
Washington, D.C.

_____

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CRIMINAL DEFENSE
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ADMITTED TO THE FLORIDA BAR 1978

November 25, 2003

William K. Suter, Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: Glenn H. Martin v. United States of America

Dear Mr. Suter:

Enclosed are the original and ten (10) copies of Petitioner's Petition for Writ of Certiorari and ten (10) copies of the Motion for Leave to Proceed In Forma Pauperis, regarding the above-referenced case. Also enclosed is a Proof of Service. Please file and docket these items.

If you have any questions, or if additional information is needed, please advise. Thank you for your assistance in this matter.

Sincerely,

WILLIAM MALLORY KENT

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