

# DC CIRCUIT REINSTATES BLACKWATER NISOUR SHOOTING PROSECUTION

On December 31, 2009 DC District Judge Ricardo Urbina dismissed the indictment against five Blackwater defendants involved in what is commonly referred to as the Nisour Square shootings occurring on September 16, 2007. Urbina's decision was 90 pages in length and was further supported by a three week long *Kastigar* hearing in his court October of 2009. A *Kastigar* hearing is an evidentiary inquiry based upon *Kastigar v. United States*, 92 S. Ct. 1653 (1972), "where a party has been compelled to relinquish his Fifth Amendment right against self-incrimination in reliance on the government's promises of immunity, the government bears the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

Today, in a surprising unanimous decision, the DC Circuit Court of Appeals overturned Urbina, reinstated the case against four of the five original defendants (the prosecution had voluntarily dismissed Defendant Slatten previously) and remanded the case back to District Court for further proceedings. Here is how Reuters described the ruling:

The five guards were charged with 14 counts of manslaughter, 20 counts of attempt to commit manslaughter and one weapons violation count over a Baghdad shooting that outraged Iraqis and strained ties between the two countries.

The shooting occurred as the private security firm's guards escorted a heavily armed four-truck convoy of U.S. diplomats through the Iraqi capital on

September 16, 2007. The guards, U.S. military veterans, were responding to a car bombing when gunfire erupted at a crowded intersection.

U.S. District Judge Ricardo Urbina ruled in December 2009 that prosecutors violated the defendants' constitutional rights and the case was tainted by use of statement the guards made to State Department investigators under a threat of job loss.

The appeals court reversed that ruling that the indictment of the guards had been improperly obtained through the use of their compelled statements. It ruled Urbina wrongly interpreted the law.

The appeals court sent the case back to Urbina to determine what evidence, if any, the government presented had been tainted and whether it was harmless.

The public version of the decision is here however, there is also a sealed classified version containing additional material.

The first thing to consider here is the standard of review the Circuit Court used in analyzing the appeal, because there were intermixing of factual and legal findings inherent in the Kastigar process, the court reviewed for clear error:

We review the district court's findings that the government used a defendant's immunized statement for clear error, *United States v. North*, 910 F.2d 843, 855 (D.C. Cir. 1990) ("North I"), a standard that is met for any finding that was "induced by an erroneous view of the law,"

In a nutshell, what that means is that the appellate court had to give strong deference to the findings by the trial court. In spite of

this deference still unanimously blew Judge Urbina's findings straight out of the water. Honestly, the abuse of the *Garrity* letter admissions by the government was serious, and I thought there was close to no chance Urbina's decision would be reversed. Boy was I wrong.

The circuit Court did not disagree with Urbina as to the controlling authority determinative of the case, so much as take issue with how far in examining individual items of evidence, for each individual defendant, on a piece by piece basis, Urbina went. They Circuit court did not think Urbina went far enough:

In building a case against a defendant who received use immunity for his statements, the government must prove, by a preponderance of the evidence, that "all of the evidence it proposes to use was derived from legitimate independent sources." North I, 910 F.2d at 854 (quoting *Kastigar*, 406 U.S. at 461-62, internal quotations omitted). As the district court observed, proof that a witness was "never exposed to immunized testimony" or that the investigators memorialized (or "canned") a witness's testimony before exposure, *Slough*, 677 F. Supp. 2d at 132 (citing North I, 910 F.2d at 872), would obviously satisfy the requirement. But a failure by the government to make either showing does not end the district court's inquiry. North I requires the court to parse the evidence "witness-by-witness" and "if necessary, . . . line-by-line and item-by-item," 910 F.2d at 872, and to "separate the wheat of the witnesses' unspoiled memory from the chaff of [the] immunized testimony," *id.* at 862. This sifting is particularly important in cases where, as here, a witness was exposed to a defendant's immunized statement but testifies to facts not included in that statement.

....

First, the district court erred by treating evidence, including the testimony of Frost, Murphy, Ridgeway and the Iraqi witnesses, and the Frost journal, as single lumps and excluding them in their entirety when at the most only some portion of the content was tainted—it made no effort to decide what parts of the testimony or the journal were free of taint.

Without directly saying it, the Circuit Court also seemed to be of the opinion that Urbina did not place enough of a burden on the defendants and their claims of tainted evidence. I think the Supreme Court may have an issue with this implication, although it does not appear critical to the decision.

Second (and closely related), the district court erred by failing to conduct a proper independent-source analysis as required by *Kastigar*, .... Where two independent sources of evidence, one tainted and one not, are possible antecedents of particular testimony, the tainted source's presence doesn't ipso facto establish taint.

Basically, the Circuit Court thought Urbina was too quick to judge derivative evidence tainted and did not show his work sufficiently in getting there. Quite frankly, I disagree, I found Urbina's decision quite sound. I have no desire to have the Blackwater malfeasants walk free, but from a due process analysis, I thought, and still do, that such was the proper remedy. Urbina was right, the case needed to be dismissed, as unpopular as that is to say.

The last major area the court went into was cross tainting between each of the defendants' statements:

This takes us to a fourth systemic

error. To the extent that evidence tainted by the impact of one defendant's immunized statements may be found to have accounted for the indictment of that defendant, it does not follow that the indictment of any other defendant was tainted. The district court assumed the contrary. *Slough*, 677 F. Supp. 2d at 166 & n.66. Although the prosecution presented a single indictment against all five defendants, each defendant was charged individually and therefore the presence, extent and possible harmfulness of the taint must be assessed individually.

What the court said here is that each defendant's statement may be improper evidence to use against him, but it is prohibitively okay against his co-defendant. This is a commonly applied rule in criminal evidence suppression determinations, but it is heinous and pernicious. In the *Nisour Square* case, the defendants were so jointly involved and the evidence so intermixed that this theory should have no application; yet here the Circuit Court is straining to apply it. It is disgusting.

We thus vacate and remand the case for the court to determine, as to each defendant, what evidence—if any—the government presented against him that was tainted as to him, and, in the case of any such presentation, whether in light of the entire record the government had shown it to have been harmless beyond a reasonable doubt.

So, the case is going back to DC District Court for further proceedings; i.e a more detailed and individually centered analysis of the prosecution's evidence for taint. Ricardo Urbina went senior status as of January 31 of this year, but I would assume he will get the case back anyway. The prosecution may be back on for now, but I would not be surprised in the least

to see Urbina simply plug his previous beliefs and findings into the newly ordered specific analysis framework delineated by the Circuit Court. In short, my bet is the case gets dismissed again. We shall see.